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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDICES

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IN THE

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OCTOBER TERM, 1969

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, General Electric Company, prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for a review of its judgment below, rendered and entered on December 27, 1968.

The Opinions Below

The opinion of the Court of Appeals (Appendix A, *infra*) is reported at —— F. 2d ——, 70 LRRM 2082. It affirms in part and reverses in part an order of the United States District Court, Southern District of New York, Weinfeld, *J.* (A. 2-20),[1] reported at 278 F. Supp. 991, 68 LRRM 2161 (S. D. N. Y. 1968).

[1] Reference is to Appendix filed below in Court of Appeals.

Jurisdiction

On February 19, 1968, the District Court entered judgment granting a motion by Respondent, International Union of Electrical, Radio and Machine Workers, AFL-CIO, for summary judgment directing, pursuant to Section 301 of the Labor-Management Relations Act, 61 Stat. 156, Title 29 U. S. C. A. §185 (1947), that arbitration be had of the issues involved in eight local grievances arising between the parties.

On December 27, 1968, the Court of Appeals entered judgment affirming the order below requiring arbitration as to four of the grievances and reversing the order as to the remaining three.[2]

On January 22, 1969, the Court of Appeals stayed execution of its mandate until February 17, 1969, pending the timely filing of a petition for certiorari and the disposition thereof by this Court. Pursuant to a motion by Petitioner dated February 11, 1969, execution of the mandate was further stayed until March 4, 1969, pending the filing and disposition of this petition.

Jurisdiction of this Court to review the judgment below is based upon 62 Stat. 928, Title 28 U. S. C. §1254(1) (1948).

Questions Presented

I. Whether the Court Below Was Obliged or Authorized by Command of Federal Policy to Disregard the Guidelines for Arbitrability of Grievances Specifically Adopted by the Parties in Lieu of Those

[2] The eighth grievance was not pressed on the appeal.

Enunciated by This Court in the *Steelworkers* Trilogy.

II. Whether the Court Below, Contrary to Federal Policy, Erroneously Ordered to Arbitration Issues Previously Disposed of on Their Merits Pursuant to the Practices and Procedures of the National Labor Relations Board.

The Facts

1. *The Approach of the Parties to Arbitration*

The grievances here in question arose under, and are governed by, the 1963 collective bargaining agreement between the parties.

The prior, or 1960, agreement between the parties had contained what has since been characterized as the "standard" type of arbitration clause.[3] It was judicially construed[4] (under the interpretative guidelines created in the *Steelworkers* trilogy[5]) in light of a presumption of arbitrability, with the party in opposition to arbitration bearing the burden of demonstrating a mutual intention to *exclude* any matter therefrom. Doubts were resolved in favor of arbitration.

Extensive and pointed language changes were made by the parties in their 1963 agreement to evidence their funda-

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[3] *International Union of Electrical, Radio & Machine Workers* v. *General Electric Co.*, 332 F.2d 485, 488 (2 Cir. 1964), *cert. denied* 379 U.S. 928; and see *Carey* v. *General Electric Co.*, 315 F.2d 499 (2 Cir. 1963), *cert. denied* 377 U.S. 908 (1964).

[4] *Ibid.*

[5] *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

mental change in approach to the question of arbitration. These changes were made with full cognizance of the *Steelworkers'* principles in general, and of the parties' own prior and related litigation in particular (A. 56-57). The express intent was to delimit sharply the scope and applicability of arbitration and to substitute the parties' own contractual code of interpretation for the general code created by the trilogy (*ibid.*).[6] The net result, in the opinion of leading authorities, was "perhaps the most elaborate and tightly drawn . . . restrictions on the arbitration process" negotiated during the post-*Steelworkers* period.[7]

Thus, by *mutual compact* of the parties, the 1963 agreement provided that, "[i]n the consideration and decision of any question involving arbitrability," the parties' own

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[6] As noted in an address by Benjamin C. Sigal, then General Counsel to Respondent, at the Labor Arbitration Institute of the Boston University Law School, April 25, 1965 (56 LRRM 156, 159):

> "There have been significant changes in the [1963] arbitration clauses in the principal contracts in the electrical manufacturing industry, . . . namely those of General Electric Co. and Westinghouse Electrical Corporation. The arbitration clauses . . . have been revised to incorporate the idea that only those grievances may go to arbitration which are expressly made arbitrable. There was a very conscious effort on the part of the employers to nullify the trilogy. . . . It is too early to say how these changes will in fact work out. In any event, there can be no doubt that these changes are to a substantial degree, attributable to the trilogy."

[7] Smith, Jones, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators and Parties,* 52 VA. L. REV. 831, 832 (1966); and see Wortman, Luthans, *Arbitration in a Changing Era,* 16 LAB. L. J. 309, 314 (May 1964); Speech by Morris L. Myers, General Counsel, Federal Mediation and Conciliation Service, Nov. 10, 1967, in BNA, 221 DAILY LAB. REP. D-1, 2 (Nov. 14, 1967); Sloane, *Grievance Arbitration at the Crossroads: The Aftermath of the Warrior & Gulf Decision,* THE PERSONNEL ADMINISTRATOR, 18 (Nov.-Dec. 1964).

interpretative principles are to apply, *i.e.*, the determination is to be made "in light of the principles of arbitrability set forth in . . . Article" XV of the agreement (A. 87-88; Appendix B, pp. 55-57 *infra*). Further, negating any presumption of arbitrability, the agreement provides that "no court or arbitrator shall or may proceed under any presumption that a request to arbitrate is arbitrable" (*ibid.*); and only in the event of a finding that the parties *"clearly agreed"* to arbitrate a matter is such matter to be deemed arbitrable (*ibid.*).

Additional clauses emphasize the parties' mutual agreement upon a highly selective approach to arbitration tailored to their own specifications. Two categories of grievances were created—those subject to arbitration as a matter of right and those subject to voluntary arbitration only by mutual agreement (A. 57-59, 87-88; Appendix B, pp. 57-61). In connection with the former, the agreement contains its own canons of construction, as well as several specific exclusionary clauses covering a wide range of subject matters.

An examination of those canons and exclusions here at issue[8] makes clear that Respondent Union's attempt to compel arbitration of the subject grievances in dispute is a negation of the principles of sharp delimitation to which Respondent explicitly agreed.

2. *Grievances N.D. 9280 and N.D. 9349 (See Appendix B, pp. 50-60, for Pertinent Contract Language)*

Piece rate prices are classified, under the 1963 agreement, as "Standard," "Temporary," or "Special" (A. 61, 80; Appendix B, p. 51). Standard price revisions, unlike Tem-

[8] See discussion *infra*, pp. 12-18.

porary or Special price revisions, must be predicated on corresponding changes in manufacturing method (*ibid.*).

The piece rate prices in the Pittsfield Cover and Base Welding Groups, Power Transformer Tank Unit, originally were Standard prices (A. 16, 62). Through local negotiations these prices, in 1956, were reclassified as Temporary and Special (*ibid.*). In 1963 and 1964, as the result of various changes not material herein, Temporary and Special prices were introduced in lieu of the existing Temporary and Special prices (*ibid.*).[9]

Respondent disputes that these prices, in 1956, were reclassified from Standard to Temporary and Special. Rather, it alleges that the prices remained Standard throughout; that the introduction in 1963 and 1964 of the new Temporary and Special prices was violative of Article VI, Section 4 of the 1963 agreement, since unaccompanied by any corresponding methods changes; and that, through arbitration, the prior prices—claimed to be Standard—should be reinstated and the proper adjustments made (A. 15-16, 32, 33, 52-54; Appendix B, pp. 51-52).

3. *Grievance N.D. 8759 (See Appendix B, pp. 52-53, 55, for Pertinent Contract Language)*

In 1964, fifteen employees of Petitioner—members of Respondent's Local 455—engaged in an economic strike at Petitioner's Trenton plant. Attempts to resolve the issues proved fruitless. The strikers were advised that, if they did not return to work, Petitioner would be forced to seek replacements in order to resume operations. The strikers

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[9] Many prices have remained Special or Temporary for extended periods of time due to a variety of reasons, the details of which are not here in question (A. 61).

voluntarily chose not to return to their then vacant positions and, accordingly, were permanently replaced (A. 70).

The replacement of the strikers became the subject both of the instant grievance and of an unfair labor practice charge filed by Respondent with the National Labor Relations Board. In each forum, Respondent's claim involved an alleged improper discharge, and threat thereof, of the strikers. The defense in each case was that none of the employees had been discharged or otherwise disciplined; that, rather, all had been properly replaced only after refusing to return to their vacant positions (A. 70-71).

The grievance, after being fully processed through the grievance procedure, was denied. The charge before the Board, likewise after a full investigation, was dismissed (A. 71). As determined by the Board's Regional Director, whose action was sustained on appeal by Respondent to the Office of the General Counsel, Appeals Division (*ibid.*):

> "The investigation reveals that the Employer *replaced* the welders who were involved in a strike for reclassification to a higher pay grade than that provided in the current collective bargaining agreement between the Employer and your labor organization. It is noted that an employer has a legal right to *replace* those engaged in a strike with economic motives. *Hot Shoppes, Inc.*, 146 NLRB no. 93. Further, the investigation including the credibility resolutions made therein, *failed to reveal sufficient evidence to establish that the Employer threatened those striking welders with discharge, rather than with replacement,* in violation of Section 8(a)(1) of the Act because they were engaged in said strike. . . .
>
> • • • •

"... Accordingly, further proceedings in these matters are not warranted at this time and I am, therefore, refusing to issue Complaint therein." [Emphasis supplied.]

Notwithstanding the Board determination, Respondent contends that the replacement of the strikers constituted a disciplinary discharge imposed without just cause, arbitrable under Article XV, Sections 1(b) and 6(a) of the agreement (A. 49; Appendix B, pp. 52-53, 55).

Reasons for Granting Writ

The decision below involves two important questions of federal law which have not been, but which should be, settled by this Court.

POINT I

N.D. 9280 and N.D. 9349 pose the question as to whether the guidelines enunciated by this Court in the *Steelworkers* trilogy preclude the parties to an agreement from adopting their own guidelines in lieu thereof.

A. *Under the mistaken belief that federal law so required, the court below relied upon the trilogy guidelines, rather than upon those mutually agreed to guidelines specifically adopted by the parties in lieu thereof, in construing the exclusionary clauses of the agreement.*

This Court stated, in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 550, n. 4 (1964), that "national labor policy requires, within reason, that 'an interpretation that ... [deems arbitrable an] asserted dispute' ... will be favored." The court below pointed out that the agreement

herein mandates otherwise (Appendix A, p. 34). Alluding to this Court's statement in the *Wiley* case, the court below acknowledged the "substantial question" thus posed, to wit: "whether 'national labor policy' may be so blithely diluted" (*id.*, n. 11 and accompanying text).

Admittedly, the court below did not rule on all aspects of this question. It did, however, rule on certain aspects, expressly and by implication. Thus, the court below considered itself obligated (Appendix A, p. 42), under federal law, to construe the exclusionary language of the agreement in light of trilogy principles which are *irreconcilable* with the principles to which the parties mutually agreed. Indeed, as the court acknowledged (*id.*, pp. 28-29, 32-34), the 1963 agreement was the result of extensive revision deliberately designed to limit the scope of arbitration established by the trilogy.[10]

The trilogy created an initial presumption of arbitrability, placing the burden upon the one opposing arbitration to demonstrate with "positive assurance" that the parties clearly agreed *not* to arbitrate. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 370 U.S. 582-83. "Doubts," under the trilogy guidelines, are to be "resolved in favor of coverage." *Ibid.*

Under the expressed principles of the 1963 agreement, no such presumption of arbitrability exists (A. 87-88, Appendix B, pp. 56-57). The reverse is true. "No matter will be considered arbitrable unless it is found that the parties *clearly agreed* that the subject . . . *would be* arbitrable" (*ibid.*). [Emphasis supplied.] Doubts, therefore, are to be resolved *against* arbitration.

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[10] See also footnote 7, p. 4, *supra*.

Under the evident belief that federal law so required, the court below resolved the irreconcilability between the trilogy guidelines and the specific rules adopted by the parties by applying the former to the exclusionary clauses in a *pro tanto* nullification of the latter. It overrode the parties' requirement that there be a clear agreement to arbitrate and instead applied "the high standard of specificity still demanded by the *Steelworkers* trilogy," requiring that the exclusionary provisions "be 'clear and unambiguous' . . . , 'garbed in unmistakably clear language' " (Appendix A, p. 42). In short, doubts were erroneously resolved by the court in favor of arbitrability.

B. *No party may be compelled to arbitrate a dispute in the absence of an agreement to do so. Whether there exists such an agreement must be determined by the court "on the basis of the contract entered into by the parties."*

This Court, in announcing the *Steelworkers* policy, did not *forbid* the contractual reversal or modification of the presumption of arbitrability. Neither did it *preclude* adoption by parties of independently fashioned guidelines deemed best suited to their particular relationship.[11] *John Wiley & Sons, Inc.* v. *Livingston,* 376 U.S. 543 (1965); *Atkinson* v. *Sinclair Refining Co.,* 370 U.S. 238, 241 (1962). As stated by this Court in the *Wiley* case, 376 U.S. at 547:

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[11] See, in this connection, *Communications Workers of America* v. *New York Telephone Company,* 327 F.2d 94, 97 (2 Cir. 1964):

"... [I]f the strong presumption in favor of arbitrability established in the Steelworkers' cases is not to be made irrebutable, we cannot close our eyes to the plain meaning of the words used in this contract."

And see *Strauss* v. *Silvercup Bakers, Inc.,* 353 F.2d 555, 557-58 (2 Cir. 1965).

"... 'Under our decisions, whether or not the Company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court *on the basis of the contract entered into by the parties.*' Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241 .... Accord, e.g., United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582. ... *The duty to arbitrate being of contractual origin*, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." [Emphasis supplied.]

The canons of construction laid down in the trilogy were intended to *encourage*, not *mandate*, grievance arbitration. They were not couched in terms of *imposing* compulsory arbitration on parties who did not wish it. Nor were they so intended. *John Wiley & Sons, Inc.* v. *Livingston, supra.* As stated in *Retail Clerks* v. *Lion Dry Goods, Inc.*, 341 F.2d 715, 720 (6 Cir. 1965), cert. denied 382 U.S. 839:

"... We recognize that the Supreme Court has stated in the recent United Steelworkers cases that the use of arbitration for the final disposition of labor-management disputes is favored as a national policy. At the same time, however, the Supreme Court has made it very clear ... that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. The recognition of this right was just recently restated in John Wiley & Sons, Inc. v. Livingston, etc., supra, 376 U.S. 543, 546-47. *With respect to this aspect*

of arbitration, it is purely a matter of contract, not a question of policy. A national policy favoring arbitration does not authorize arbitration unless the contract so provides. Atkinson v. Sinclair Refining Co., supra, 370 U.S. 238, 241, 82 S. Ct. 1318." [Footnotes omitted, emphasis supplied.]

Thus, notwithstanding a national labor policy designed to encourage arbitration, a party may not be compelled to arbitrate that which he has not agreed to submit to arbitration.[12] Nor may the determination be made on a basis inconsistent with that expressly provided for by the parties in their agreement. Indeed, no obligation exists—even under national policy—to have *any* arbitration agreement whatsoever.[13] Construction of agreements which, in effect, impose arbitration against the will of the parties are erroneous and, we submit, should be so pronounced by this Court.

C. *N.D. 9280 and N.D. 9349, on the basis of the agreement entered into by the parties, are not arbitrable.*

N.D. 9280 and N.D. 9349 involve requests by Respondent to change or reclassify allegedly incorrect or improper

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[12] See also, in this regard, Section 203(d) of the National Labor Relations Act, 61 Stat. 153, Title 29 U.S.C.A. §173(d) (1947):

"(d) Final adjustment *by a method agreed upon by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." [Emphasis supplied.]

[13] The implicit recognition of this right was most recently acknowledged in *United Electrical, Radio & Machine Workers of America* v. *N.L.R.B.*, —— F.2d ——, 70 LRRM 2529 (C.A.D.C., Feb. 11, 1969), where the court noted, without the slightest intimation of unlawfulness, the predilection of a union for strike action *in lieu of resort to arbitration.*

incentive rates introduced by Petitioner in claimed violation of Article VI, Section 4 of the agreement (set forth *in extenso,* Appendix B, pp. 51-52). Article VI, Section 4, in pertinent part, defines the three classifications of rates here involved as follows:

> "(a) (1) *A Standard Piece Price* is one set where the manufacturing method has become established.
>
> (2) *A Temporary Piece Price* is one set where the manufacturing method is under development or has been changed, or the average pieceworker on the job has not yet attained normal performance.
>
> (3) *A Special Piece Price* is one set on work which usually repeats infrequently or is in small quantities or has some special feature or purpose."

Respondent contends that the appropriate piece rate prices were and should remain Standard. Petitioner, disputing this, maintains that the appropriate rates under the agreement were and should remain Special and Temporary—not Standard. There exists, in other words, a question or dispute affecting individual or group piecework rates, incentive standards, etc. In resolving this question or dispute, an arbitrator necessarily will have to consider, rule on or decide, on the basis of the agreement, whether the appropriate rates should be Standard, Temporary or Special.[14]

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[14] The opinion below of the district court makes this readily apparent. The issue, as phrased by the district court, was "whether the piecework rates, as defined by the parties, have been applied

Yet Article XV, Section 7(e) of the agreement *precludes* arbitration of any matter which would require an arbitrator to "consider, rule on or decide the appropriate . . . incentive rate" (Appendix B, p. 63). The footnote thereto confirms that "disputes over . . . rates of pay, incentive standards, etc. are assigned by the parties to local negotiations and not to arbitration" (*ibid.*). And Article VI, Section 1, to which the footnote refers, eliminates any possible doubt that "[a]ny question which *affects* hourly rates, piecework rates or salary rates of individuals or groups shall be subject to negotiations," and not to arbitration (*id.*, p. 54). [Emphasis supplied.]

In making its determination as to the arbitrability of these rate questions, the court below interpreted the 1963 agreement as though its exclusionary clauses affecting rate questions remained virtually unchanged from the parties' 1960 agreement, construed in *Carey* v. *General Electric Co., supra.* In the same way, it acted as though the 1963 agreement were couched in the language of a similarly outdated Westinghouse agreement construed in *International Union of Electrical, Radio & Machine Workers* v. *Westinghouse Electric Corp.*, 268 F.2d 352 (3 Cir. 1959). This led to fundamental error.

The limiting language in the earlier GE and Westinghouse agreements, in essence, precluded an arbitrator from "establish[ing] or modify[ing]" any piece rates or

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. . . in accordance with the Agreement" (A. 17). In considering the propriety of the rates in question, the court used the terms "properly" and "incorrect" (*ibid.*). By definition (*Webster's New Int'l Dict.*, 2d Ed. 1959), the terms "proper" and "correct" are interchangeable with the term "appropriate". Thus, the court's characterization of the dispute, in terms of the interchangeable verbiage, was tantamount to saying that the issue involved was whether the applied rates in dispute were "appropriate" or "inappropriate."

time values (A. 63-64). This language was construed as follows, 315 F.2d, at 507:

> " . . . [T]he arbitrator cannot establish wage rates or job classifications where none existed before and cannot modify those rates and classifications which have been hammered out at the bargaining table. . . . Such remedies partake more of 'legislation' than adjudication, and our reading of the limiting clause merely gives effect to the parties' apparent intention to restrain the arbitrator from exercising a legislative function. The employer argues that the arbitrator necessarily 'establishes or modifies' a wage rate or job classification whenever he declares improper some wage or job decision of the employer; in short, that there is an unauthorized 'modification' whenever the arbitrator suggests a change in the status quo. We cannot adopt such a construction of the limiting clause. *If a change in the status quo is necessitated by an interpretation of the collective bargaining agreement, then it is not an unauthorized modification.* The employer's construction of a similar provision was recently rejected by the Court of Appeals for the Third Circuit in Radio Corp. of America v. Association of Professional Eng'r Personnel, 291 F.2d 105, 109 (3d Cir.), cert. denied, 368 U.S. 898 (1961),[5] and International Union of Elec. Workers v. Westinghouse Elect. Corp., 268 F.2d 352, 355 (3d Cir. 1959).[6] " [Footnotes omitted, emphasis supplied.]

The changed language in the 1963 agreement vastly expanded the contours of the 1960 contract language. Indeed, during the 1963 negotiations, Petitioner expressed

to Respondent (A. 63-64) its intention not only of reversing the *Steelworkers* presumption of arbitrability, but also of meeting the limitations imposed by the *Carey* and *Westinghouse* decisions. Through negotiations, this objective was accomplished (*ibid.*). First, in addition to the new interpretative guidelines outlined above, the parties broadened the scope of the exclusion by substituting for the words "establish or modify" the far more encompassing terms, "consider, rule on or decide." To this, they added the footnote to Section 7(e), assigning all "disputes over individual . . . rates of pay, incentive standards, etc. . . . to local negotiations, and not to arbitration." And, finally, the parties tied in the footnote with Article VI, Section 1 to indicate that "[*a*]*ny* question" even "*affect*-[*ing*] piecework rates . . . of individuals or groups shall be subject to [local] negotiation" and "not to arbitration" (A. 79, 89-90; Appendix B, pp. 50, 58-60). [Emphasis supplied.]

The court below acknowledged that Petitioner's "argument may be literally correct" (Appendix A, p. 39). This very acknowledgment, in itself, negated the existence of a clear agreement to arbitrate. The court, however, did "not think that this is the type of rate dispute which section 7(e) was intended to exclude" (*ibid.*).[15] Rather,

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[15] The court rejected the literal interpretation because (1) it believed such an interpretation to be inconsistent with the application of Article XV, Section 6(b) of the agreement; and (2) the parties did not (as they did elsewhere) specifically designate, by number, Article VI, Section 4 as one of the provisions excluded from arbitration (Appendix A, p. 40, n. 14, p. 43). Neither of these reasons withstands analysis.

First: The court's reliance upon Section 6(b) is erroneous. Significantly, neither this provision nor the argument the court makes in connection therewith was raised by Respondent. Section 6(b) illustratively points out that "a request which claims incorrect application of the method of computing overtime pay under

it believed the revised 1963 language *"suggests"* the limited purpose of precluding "arbitration of the adequacy of pay rates . . . , [legislative] types of assessment ordinarily concluded at the bargaining table" (*ibid.*). [Emphasis supplied.] Adjudications as to whether the agreement has been violated, in the court's opinion, were not excluded (*ibid.*).

The fallacy of this distinction between "legislative" considerations and "adjudicatory" determinations as to contractual violations is highlighted by the court's acknowledgment of certain issues which it concedes, under the revised language, would *not* be arbitrable, *e.g.*, the adequacy of a change in rate brought about by a change in

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the provisions of Section 2 of Article V would be arbitrable as a matter of right. . . . " (*id.* at p. 40, n. 14). Such a grievance, the court reasons, literally would "compel the arbitrator [in the exclusionary language of Section 7(e)] to 'consider, rule on or decide' the appropriate pay rate or method of determination" (*ibid.*). The "method" of determination to which the Section 7(e) exclusionary language applies, however, is expressly confined to a determination as to whether the rate shall be "day, salary or incentive"; it has nothing to do with the overtime method of calculation. Similarly, the exclusionary language concerning the appropriateness of a rate does not purport to encompass a question as to the proper multiplier (straight-time, time and one-half, double time) to be applied to a rate. *The multiplier in no way changes or affects the basic rate. The rate itself is, on the other hand, defined in terms of its classification and is directly affected thereby;* for the monetary aspect of the rate, and its method of determination, often are dependent upon whether the rate is classified as Standard, Temporary or Special.

Second: The court's reliance upon the failure of the parties to exclude, by section number, Section 4, also was in error. Of the twelve exclusionary provisions set forth in Article XV, Section 7, only five specifically refer, by number, to individual clauses in the agreement. The majority, or seven remaining exclusions, are predicated on subject matters which, as is readily apparent, are dealt with in more than one particular article or section of the agreement.

manufacturing method (Appendix A, p. 43). Article VI, Section 4(b) contractually mandates that, in the event of a change in manufacturing method, "the adjusted price will be in direct proportion to the change in allowed time for the part of the job affected by the new method" (Appendix B, p. 51). Failure to follow this mandate would result in a contractual violation. Yet, by the court's own acknowledgment, the arbitrator is precluded from resolving such a contractual question as to the adequacy of the changed rate. The test established by the court below, in short, does *not* demark the boundary line between the arbitrable and the nonarbitrable. The distinction based upon that test, therefore, is invalid under the agreement as drawn by the parties.

The court evidently felt itself inhibited by the trilogy from giving the amendatory language its full scope and effect. Superimposition of the trilogy guidelines, where the parties have established other guidelines of their own, however, is not consonant with the underlying principle of the trilogy. This case, we submit, presents a situation calling for an adjudication of the continuing paramount rights of the parties to fix their own limits of arbitrability.

POINT II

N.D. 8759 poses the type of "serious problems" involving concurrent jurisdiction to which this Court has previously indicated that it would address itself "when they arise."

N.D. 8759 poses the type of "serious problems" to which this Court indicated, in *Smith* v. *Evening News,* 371 U.S. 195, 197-98 (1962), that it would address itself "when they arise." The problems stem from the potential exercise in arbitration of concurrent jurisdiction over issues already raised before, and ruled upon by, the National Labor Relations Board.

Admittedly, the ultimate issues before the Board were statutory,[16] while those before an arbitrator would be contractual. Nonetheless, the Board, in making its statutory determination, necessarily found against the keystone of Respondent's position herein, *viz.,* that there occurred discharges or other disciplinary penalties.

The case is not to be confused with those in which the issue before the Board is whether discharge or disciplinary action was invoked for reasons violative of the statute, while that before the arbitrator is whether such action was invoked for "just cause". The decisive issue in this case is whether there occurred discharge at all. This is precisely the issue determined in the Board proceeding.

Had there been discharge or other disciplinary action, a Labor Board complaint automatically would have issued

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[16] The court below mistakenly assumed that the unfair labor practice charge before the Board was confined to Section 8(a)(1) of the statute (Appendix A, p. 45). The charge in fact, encompassed Section 8(a)(3) of the statute as well (A. 18, n. 14 and accompanying text, A. 48).

under the circumstances at hand; for such action is equated with reprisal for engaging in a lawful strike. *Valley Die Cast Corp.*, 130 NLRB 508 (1961), enf'd 303 F.2d 64 (6 Cir. 1962); *Cincinnati Cordage & Paper Co.*, 141 NLRB 72, 75-76 (1963). As stated in the *Valley Die Cast Corp.* case, 130 NLRB at 515:

> "The legal principles here applicable are well settled in *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333; *N.L.R.B.* v. *Globe Wireless Ltd.*, 193 F.2d 748, 750 (CA9), and cases cited. Generally speaking, strikers retain their status as employees of their employer and are protected against unfair labor practices denounced by the Act. In the case of an economic strike, however, an employer may, in order to protect his legitimate interests, permanently replace the strikers, and, to the extent that he does so, he is not required to reinstate them. *Absent such replacement, however, the employer may not discharge or refuse* upon request to reinstate *economic strikers. Such action constitutes a reprisal for the mere act of striking* and *pro tanto,* trenches upon a guarantee specifically vouchsafed by Sections 7 and 13 of the Act. See also Section 2(3) of the Act." [Emphasis supplied.]

Here the Board found that Petitioner *"replaced"*, not discharged, the employees (A. 71; and see *Cincinnati Cordage & Paper Co.*, 141 NLRB at 75-76).[17] To allow, through arbitration, the opportunity for an inconsistent determination would be to undermine and play havoc with the fundamental legal principles well settled by this Court in *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333.

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[17] As stated in the *Cincinnati Cordage* case, *supra* at 75-76, "[u]nder settled law, an employer may *replace* economic strikers but he may not *discharge* them for going on strike." [Emphasis supplied.]

To be sure, the proceeding before the Board was administrative only. As between the parties, however, it represents a final and binding determination on the precise issue here in dispute. See *Local 282, Int'l Bro. of Teamsters* v. *N.L.R.B.*, 339 F.2d 795 (2 Cir. 1964); *McLeod* v. *Local 239, Int'l Bro. of Teamsters*, 330 F.2d 108 (2 Cir. 1964); *Electrical Contractors Ass'n* v. *Ordman*, 258 F.Supp. 762 (S.D. N.Y. 1965). Respondent should not now be able to relitigate this question, through arbitration, with the hope of obtaining a contrary result. See, in this connection, *Kentile Co., Inc.* v. *Rubber Workers*, 228 F.Supp. 541, 544 (E.D. N.Y. 1964):

> "I am mindful of the principle enunciated in Textile Workers v. Lincoln Mills, 353 U.S. 448, United Steelworkers v. Warrior & Gulf Navigation Co., 353 U.S. 564, United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 693 . . . that Congressional policy favored the enforcement of agreements to arbitrate grievance disputes. In none of these cases, however, had there been a decision by a trial examiner of the Board which had passed upon the very question to be arbitrated. . . . Here, however, we have the converse situation, an action to stay arbitration pending the decision of the Board on a charge filed by the employer, involving the very question to be arbitrated, *and in which there had been a preliminary finding against the union by the Board's examiner.*" [Emphasis the Court's.]

Matter of Buchholz, 15 N.Y.2d 181, 186 (1965), involving an administrative determination by the Board's Regional Director:

"... We are not here concerned with preemption, but rather with the question of whether or not we will hold open our tribunals, our courts and our arbitration rooms for the adjudication of an issue which has been considered and resolved by this competent National labor tribunal. Both parties in this arbitration proceeding were before the Regional Director in the decertification proceedings, both sides were heard and the issue raised in the present proceedings was examined and decided by the Regional Director. ... Under these circumstances the grievance alleging an unjust discharge is no longer an open question and may not now be submitted to the arbitrators." [18]

And *Bluebird Knitwear Co.* v. *Livingston,* 54 LRRM 2476 (N.Y. Cty. 1963), also involving an administrative determination by the Board's Regional Director:

"... The rule ... is quite different where either party had already submitted its claim to the board and the latter has accepted and ruled on it. Such ruling precludes further proceedings by way of arbitration. .... If arbitration were allowed after the precise question has been ruled on by the National Labor Relations Board, the result could be contrary holdings on a single issue—a situation always to be avoided."

The words of the Second Circuit in *McGuire* v. *Humble Oil & Refining Co.,* 355 F.2d 352, 356 (1966), *cert. denied*

[18] Though decided by a divided court, the majority and dissenting opinions in the *Buchholz* case differed only as to the nature of the factual issues resolved in the Board proceedings; there was no difference of opinion as to the controlling principle to be applied, *i.e.,* that arbitration should be stayed where the issues sought to be arbitrated already have been ruled upon by the Board.

384 U.S. 988, dealing with the question of arbitrability and concurrent jurisdiction in previously unexplored areas, are most pertinent in this regard:

"... [W]e are now fashioning a feature of federal labor law in the context of the policy to be deduced from an integration of the various relevant Acts of the Congress and the decisions of the courts in the field of labor law. Just as Wiley broke new ground and did so in the light of the existing body of federal law on the subject, so must we now put the strands of this case together and arrive at a reasoned conclusion consistent with the spirit and tenor of the principles already developed. In the light of Wiley we do not see how we can arrive at any other conclusion than that to direct arbitration here would disturb the harmony of the existing body of federal labor law and tend to foster rather than prevent industrial strife and unrest."

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: March 3, 1969.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

Judgment

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 65-C-2661

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Plaintiff,

—v.—

GENERAL ELECTRIC COMPANY,

Defendant.

This cause having come on to be heard on motion of the plaintiff for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Court having considered the pleadings in the action, the affidavit of John H. Callahan, dated September 8, 1967, in support of the motion, the affidavit of E. J. Ritter, dated October 27, 1967, in opposition thereto, and having heard oral argument on the said motion and having found that there is no genuine issue of material fact to be submitted to the trial court and having concluded that plaintiff is entitled to judgment as a matter of law and having filed its opinion constituting the Court's findings and conclusions herein, it is hereby

ORDERED that plaintiff's motion for a summary judgment be and hereby is in all respects granted; and it is further

ORDERED, ADJUDGED AND DECREED that the Clerk of this Court be and hereby is directed to enter a final judgment together with costs to be taxed in favor of the plaintiff International Union of Electrical, Radio and Machine Workers, AFL-CIO, and against the defendant General Electric Company upon the order and opinion herein granting plaintiff's motion for a summary judgment; and it is further

ORDERED, ADJUDGED AND DECREED that arbitration, in accordance with the Opinion of the Court, be had of the issues involved in the unsettled grievances known as National Docket Nos. 7309, 7788, 8290, 8427, 8643, 9280, 9349 and 8759 as requested by the plaintiff which have arisen under the applicable collective bargaining agreements and shall proceed between the plaintiff and the defendant in the way and manner set forth and provided in the said collective bargaining agreements within 15 days from the date of service of a copy of this judgment with notice of entry.

Dated: New York, New York
February 16, 1968

s/EDWARD WEINFELD
U. S. D. J.

Judgment Entered 2/19/68

JOHN J. OLEAR, JR.
Clerk

Court of Appeals Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 69—September Term, 1968.

(Argued September 18, 1968 Decided December 27, 1968.)

Docket No. 32274

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Plaintiff-Appellee,

—against—

GENERAL ELECTRIC COMPANY,

Defendant-Appellant.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Edward Weinfeld, *J.*, 278 F. Supp. 991 (1968), directing arbitration of various union grievances. Affirmed as to four grievances; reversed as to three.

DAVID L. BENETAR, New York, N. Y. (Nordlinger, Riegelman, Benetar & Charney, Thomas F. Hilbert, Jr., Michael I. Bernstein, on the brief), *for Defendant-Appellant.*

ROBERT FRIEDMAN, New York, N. Y. (Irving Abramson, on the brief), *for Plaintiff-Appellee.*

FEINBERG, *Circuit Judge*:

This appeal is from a judgment of the United States District Court for the Southern District of New York, Edward Weinfeld, *J.*, 278 F. Supp. 991 (1968), granting the motion of appellee International Union of Electrical, Radio and Machine Workers ("Union") to compel appellant General Electric Company ("Company") to submit certain grievances to arbitration. One of these grievances arose under the 1960-1963 National Agreement between the parties. The other six,[1] arising under their 1963-1966 National Agreement, present this court with the difficult task of applying unsually complex contractual language to a variety of factual situations within the framework of the broad federal principles of arbitrability enunciated in the *Steelworkers* trilogy. *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). For reasons given below, we affirm the order requiring arbitration as to four of the grievances and reverse as to three, with the writer of this opinion differing from his brothers as to the disposition of one grievance (N. D. 8290).

I

It is well established that whether the parties to a bargaining contract have agreed to submit specific issues to arbitration is for the court to determine. *Atkinson* v. *Sin-*

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1 An eighth grievance is not pressed on this appeal.

clair Refining Co., 370 U. S. 238, 241 (1962); see *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, 546-57 (1964).[2] When the question is raised under an agreement containing a broad or "standard" arbitration clause, this is now not usually a difficult issue; the court's function is limited to determining whether there is any reasonable construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. Under the *Steelworkers* doctrine:

> Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement.
>
> * * * * *
>
> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Warrior & Gulf, 363 U. S. at 581, 582-83.

The contract in dispute in *Warrior & Gulf* called for arbitration of "differences . . . as to the meaning and application of the provisions of this Agreement," 363 U. S. at 576; in *American Mfg. Co.*, its companion case, the arbitration provision covered: "Any disputes, misunderstand-

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2 This is clearly not a case in which the parties "have provided that any dispute as to whether a particular claim is within the arbitration clause is itself for the arbitrator." *American Mfg. Co.*, 363 U. S. at 571. Both contracts specifically provide that in the event of disagreement as to arbitrability, the American Arbitration Association "shall have authority to process the request for arbitration . . . only after a final judgment of a Court has determined that the grievance upon which arbitration has been requested raises arbitrable issues and has directed arbitration of such issues."

ings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement." 363 U. S. at 565 n. 1.[3] Similarly sweeping, "standard" arbitration clauses have frequently been construed by the federal courts subsequent to the *Steelworkers* trilogy to require arbitration of any grievance not expressly excluded, without weighing the claim on the merits. See, e.g., *John Wiley & Sons* v. *Livingston*, 376 U. S. 543 (1964); *Communications Workers* v. *Bell Telephone Laboratories, Inc.*, 349 F. 2d 398 (3d Cir. 1965); *General Warehousemen Union* v. *American Hardware Supply Co.*, 329 F. 2d 789 (3d Cir.), cert. denied, 379 U. S. 829 (1964); *Procter & Gamble Union* v. *Procter & Gamble Mfg. Co.*, 298 F. 2d 644 (2d Cir. 1962).

The arbitration provisions in the 1963-1966 Agreement here in issue, however, are considerably more detailed and limited than the typically general language of an ordinary arbitration clause. Rather than being an agreement in which "the parties have agreed to submit all questions of contract interpretation to the arbitrator," *American Mfg. Co.*, 363 U. S. at 567-68, or in which "the exclusion clause is vague and the arbitration clause quite broad," *Warrior & Gulf*, 363 U. S. at 585, the 1963 contract attempts to delineate a more restricted area of arbitrability. Indeed, it is clear that the language of the 1960 Agreement[4] was extensively

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3 Similarly, the contract in the third case of the trilogy provided for arbitration of any differences "as to the meaning and application" of the agreement. *Enterprise Corp.*, 363 U. S. at 594. While this decision concerned enforcement of an arbitrator's award, and is thus not directly applicable to the present controversy, it also reflects the Court's preference for resolution of labor disputes by arbitration rather than by judicial determination.

4 The 1960 arbitration clause is a typical "standard" type, providing for arbitration of "the interpretation or application of a provision of this Agreement"; "a disciplinary penalty" is also arbitrable.

revised in the 1963 Agreement in a deliberate effort to limit the scope of arbitration established by the *Steelworkers* trilogy.[5]

Article XV of the 1963 Agreement contains unusually lengthy and complicated provisions. Section 1, the bulk of which appeared in the 1960 Agreement, begins with a broad provision allowing, but not requiring,[6] arbitration of any grievance involving either "the interpretation or application of a provision" of the Agreement or a "disciplinary penalty." However, section 4(b), which is new, divides arbitrable questions into two categories: those subject to arbitration as a matter of right and those subject only to voluntary arbitration, i.e. by the written agreement of both parties as to a particular dispute. The first category is defined in section 6:

> (a) Arbitration as a matter of right includes only requests to arbitrate which involve:
>
> (i) Disciplinary action (including discharge) but with certain exceptions spelled out in this Article;
>
> (ii) The claimed violation of a specific provision or provisions of the National Agreement (with the

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5 See Jones & Smith, The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties, 52 Va. L. Rev. 831, 904 n. 181 (1966): "Of all the recently negotiated provisions containing restrictions on the arbitration process and attempts to shore up 'management rights' perhaps the most elaborate and tightly drawn are contained in the General Electric Company-IUE agreement of 1963."

6 The 1960 Agreement provides that any grievance "which involves . . . the interpretation or application of a provision of this Agreement . . . *shall* be submitted to arbitration." (Emphasis added.) The 1963 Agreement uses the word "may," since some of this broad group of grievances are now arbitrable only by mutual consent.

limitations and exceptions set out in this Article); . . .[7]

(b) A request for arbitration, in order to be subject to arbitration as a matter of right . . . must allege a direct violation of the express purpose of the contractual provision in question, rather than of an indirect or implied purpose. For example, a request which claims incorrect application of the method of computing overtime pay under the provisions of Section 2 of Article V would be arbitrable as a matter of right, whereas a request which questioned the right of the Company to require the performance of reasonable overtime work, on the claimed ground that Article V contains an implied limitation of that right, would be subject only to voluntary arbitration. A request that Article XI and the appropriate Local Seniority Supplement had been violated by the layoff of a senior employee in preference to a junior employee would be arbitrable as a matter of right but a request that subcontracting of work in the plant while bargaining unit employees are on layoff violated a claimed implied limitation of Article XI and the applicable Local Seniority Supplement would be subject only to voluntary arbitration.

Section 7 states:

All requests for arbitration which are not subject to arbitration as a matter of right under the provisions of Section 6 above, are subject only to voluntary arbitration. In particular, it is specifically agreed that

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7 A third provision is not relevant to this discussion.

arbitration requests shall be subject only to voluntary arbitration, by mutual agreement, if they

* * * * *

(c) Involved claims that an allegedly implied or assumed obligation of this National Agreement has been violated.

Finally, section 4(b) adds a number of further criteria:

(iii) This Agreement sets out expressly all the restrictions and obligations assumed by the respective parties, and no implied restrictions or obligations inhere in this Agreement or were assumed by the parties in entering into this Agreement.

(iv) In the consideration of whether a matter is subject to arbitration as a matter of right, a fundamental principle shall be that the Company retains all its rights to manage the business, including (but not limited to) the right to determine the methods and means by which its operations are to be carried on, to direct the work force and to conduct its operations in a safe and effective manner, subject only to the express limitations set forth in this National Agreement . . . and it is understood that the parties have not agreed to arbitrate demands which challenge action taken by the Company in the exercise of any such rights, except where such challenge is based upon a violation of any such express limitations (other than those set out in Section 7 below).

(v) No matter will be considered arbitrable unless it is found that the parties clearly agreed that the

> subject involved would be arbitrable in light of the principles of arbitrability set forth in this Article and no court or arbitrator shall or may proceed under any presumption that a request to arbitrate is arbitrable.

The immediate effect of reading these provisions is a nostalgic reminder that use of the "standard" arbitration clause, combined with the *Steelworkers* test, considerably eases the task of courts in deciding when to order arbitration. When an arbitration clause begins to resemble a trust indenture, one wonders what gain there is for either party in agreeing to arbitrate at all, other than the questionable joys of litigation. Nevertheless, we cannot avoid grappling with the contract the parties have given us. The Union's construction of all the quoted prose is simply that it has no effect whatsoever. The Union contends that despite any of these clauses all grievances involving disciplinary actions or the *interpretation or application* of the Agreement are still arbitrable as of right; that the language is not sufficiently clear and unambiguous either to exclude any subject matter from arbitration or to reverse the presumption of arbitrability; in short, that we are faced with exactly the sort of unrestricted arbitration clause to which the *Steelworkers* cases were directed. But the 1963 contract is obviously different from the agreements in those cases. Arbitration as of right is clearly limited to matters involving "disciplinary action" and "claimed violation of a specific provision" of the Agreement; an "implied or assumed obligation" is specifically excluded from arbitration as a matter of right; "violation of a specific provision" is further qualified as "a direct violation of the express purpose of the contractual provision"; examples are given in

an attempt to clarify the difference between an "express" and an "implied" purpose; a court is told that no matter is arbitrable unless it finds that the parties "clearly agreed that the subject involved would be arbitrable in light of the principles of arbitrability set forth" in the contract; and finally, a court is instructed not to "proceed under any presumption" of arbitrability.

Before assessing the effect of these provisions, it may be helpful to analyze briefly some of the types of questions that may arise: (1) Does the contract contain the "substantive commitment" [8] that a union must prove in order to succeed on the merits in the arbitration proceeding? Before the trilogy, it was common for courts to spend much time and effort on this issue; frequently, arbitration would be refused on the ground that the union could not win on the merits. Thus, in *International Ass'n of Machinists* v. *Cutler-Hammer, Inc.*,[9] the court held that a promise to "discuss" bonuses was so clearly not a commitment to grant one that there was no sense arbitrating about it. The trilogy accorded *Cutler-Hammer* the dubious distinction of being singled out for disapproval. See *American Mfg. Co.*, 363 U. S. at 566-67. (2) Assuming that the contract contains the substantive commitment upon which a union relies, do the facts support the union claim? For example, a contract may provide that a company cannot change hourly rates unless the union agrees but may allow the company to change piece rates without restraint. If the union says that a changed rate is hourly, while the company resists arbitration with the claim that it is a piece rate, the issue is purely factual. (3) Does the arbitra-

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8 Smith & Jones, The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law, 63 Mich. L. Rev. 751, 781 (1965).

9 271 App. Div. 917, 67 N. Y. S. 2d 317, aff'd, 297 N. Y. 519, 74 N. E. 2d 464 (1947).

tion clause cover the dispute? This will require examination and construction first of the language committing disputes to arbitration and then of any clause excluding certain disputes from arbitration.

We turn back now to the extensive changes in the 1963 Agreement. Two apparent purposes of these varied formulations are to eliminate compulsory arbitration of claims based upon implied rather than express obligations and to nullify the presumption of arbitrability of the *Steelworkers* trilogy. The former restriction raises a type of question labelled (1) above, since it authorizes a limited examination of the substantive commitment upon which the Union relies; i.e., is the contractual obligation ultimately relied on express or implied? Even though the line between implied and express often shades into imperceptibility, that purpose cannot in all conscience be ignored. We believe that the extensive revisions in 1963 require the party invoking arbitration under Article XV, section 6(a)(ii) at least to point to specific contract language which covers the subject of the grievance.[10]

We have more doubt as to the effect of the admonition not to apply a presumption of arbitrability. First, ignoring a presumption still requires us to search for controlling doctrine. In addition, there is a substantial question whether "national labor policy" may be so blithely diluted.[11] Moreover, the command not to presume does not distinguish among the three types of issues described above. As to type (2)—where the substantive commitment is clear but the facts are not—which party's version is correct

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10 Reliance upon section 6(a)(i) (discipline) for arbitrability raises special considerations, discussed below in Part III of the opinion.

11 See *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, 550 n. 4 (1964): "[*N*]*ational labor policy* requires, within reason, that 'an interpretation that covers the asserted dispute' . . . be favored."

should determine the merits of the dispute, but ordinarily not its arbitrability. See *Los Angeles Paper Bag Co.* v. *Printing Specialties Union*, 345 F. 2d 757 (9th Cir. 1965); but cf. *District 50, United Mine Workers* v. *Chris-Craft Corp.*, 385 F. 2d 946 (6th Cir. 1967). Otherwise, in order to decide whether a case is arbitrable, a court would have to try it on the merits, e.g., determine whether the rate was hourly or piece in the type (2) hypothetical given above.[12] We think that as to this type of question, a command to ignore a presumption of arbitrability would have to be much more specific to be effective. In any event, with that exception, we need not decide the effect of this part of the 1963 Agreement because we do not rely on any general presumption in deciding the arbitrability of the particular grievances at issue.

Finally, we recognize that our role is still not to appraise the merits but to determine whether the Agreement's more rigorous test of prima facie arbitrability is met. We leave to further discussion below such issues as the effect of exclusionary language, once that higher threshold has been crossed, and the arbitrability of claims under Article XV, section 6(a)(ii) that "discipline" has been improperly imposed.

Accordingly, with the provisions of this unusual contract in mind we turn to the first four grievances before us and other pertinent contract clauses. In each case we will ascertain whether the grievance involves a "claimed viola-

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12 We do not foreclose the possibility that a union's claim might be so totally devoid of possible merit on the facts or the evidence of bad faith on its part so patent as to justify the court in an appropriate case in refusing to submit the grievance to arbitration. It may be that where the union's claim is clearly unconscionable, "a perversion of the grievance procedure," *Local 787, IUE* v. *Collins Radio Co.*, 317 F. 2d 214, 220 (5th Cir. 1963), the court should deny it the deference accorded to even "frivolous" matters.

tion of a specific provision," as defined above, and then determine whether any other provision of the Agreement, not yet discussed, specifically excludes it from arbitration.

II

Four of the grievances pressed under the 1963 Agreement involve disputes over piece-rate prices paid employees for certain operations. Article VI of the Agreement provides in part:

> 4. *Piece Prices—Hourly Rated Piecework Employees*
>
> (a) Piece prices are classified as standard, temporary or special and all piecework vouchers will indicate the classification.
>
> (1) *A Standard Piece Price* is one set where the manufacturing method has become established.
>
> (2) *A Temporay Piece Price* is one set where the manufacturing method is under development or has been changed, or the average pieceworker on the job has not yet attained normal performance.
>
> (3) *A Special Piece Price* is one set on work which usually repeats infrequently or is in small quantities or has some special feature or purpose.
>
> (b) There will be no change in a standard price except where there is a change in manufacturing method.
>
> * * * * *
>
> (c) Subject to the foregoing, the Company will replace a temporary price with a standard price within six months if reasonably possible under the circumstances.

This language also appeared in the 1960 Agreement.

N. D. 8427 and 8643

The first two grievances are over Special piece prices. N. D. 8427 involves the Pittsfield tap selector piece price, which the Company claims and the Union does not deny has been Special for twenty years. The Union contends that the Company has failed to set a Standard piece rate on the job, that it has returned to the manufacturing method previously used when the price was Standard, and that the Standard price should thus be reinstated. N. D. 8643 involves a Pittsfield shear operation piece price, which has always been Special. The Union contends that it has been changed to a new Special rate, and that this change is unauthorized because unaccompanied by any change in manufacturing method.

The Union rests its claim for arbitration on an alleged violation of Article VI, section 4, set out above. But the Union cites no specific language which even deals with restraints upon the Company in setting new Special piece prices or altering the method of manufacture on such jobs. Section 4(b) is directed at Standard prices only. Section 4(c) deals only with failure to replace Temporary with Standard rates in timely fashion. Since it is uncontradicted that the rates here are Special, sections 4(b) and 4(c) do not apply. It is true that the Union has gone through the form of citing a section of the contract, which it says has been violated. But under these complex arbitration provisions it must do more; it must at least rely on specific language that arguably expressly covers the "subject" of the grievance.[13] It has not done so here. As

13 See *Boeing Co.* v. *UAW Local 1069*, 349 F. 2d 412 (3d Cir. 1965); *Independent Petroleum Workers* v. *American Oil Co.*, 324 F. 2d 903 (7th Cir.), aff'd by an equally divided Court, 379 U. S. 130 (1964). If "it is the plaintiff's position that the mere allegation that the agreement has been violated, ipso facto, entitles it to arbitration," that position "is devoid of all logic." *Id.*, 324 F. 2d at 906-07.

the Union does not indicate any other provision violated by the Company's actions in these two instances, the grievances are not arbitrable as of right under Article XV, section 6(a)(ii). Accordingly, we reverse the judgment of the district court as to them.

N. D. 9280 and 9349

N. D. 9280 and 9349 concern changes made in 1963 and 1964 in price rates for power transformer cover welder and layout tack weld-weld bases. In both grievances, the Union claims that the piece prices prior to the changes were Standard and that the changes were made without a change in manufacturing method in violation of Article VI, section 4. The Company denies that the prices were Standard at the time of the changes in question, asserting that they have been Temporary or Special for many years.

These grievances fall squarely within the language of section 4(b). Since the Union contends that the prices were Standard and were changed without a corresponding manufacturing change, it raises a "claimed violation of a specific provision" of the Agreement under Article XV, section 6(a)(ii). The subject of the grievance—restraint upon changes in Standard rates—is clearly covered by the contract. The Company's position that the prices were not Standard raises a factual issue, which—as we have pointed out—goes to the merits of the dispute, rather than its arbitrability. Accordingly, unless other exclusionary language is controlling, the Union is entitled to arbitration as a matter of right on the issues whether the prices were Standard and were changed without a change in method of manufacturing.

However, the Company argues that arbitration of these two grievances is expressly barred by Article XV, section 7:

> In particular, it is specifically agreed that arbitration requests shall be subject only to voluntary arbitration, by mutual agreement, if they
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> * * * * *
>
> (e) Would require an arbitrator to consider, rule on or decide the appropriate hourly, salary or incentive rate at which an employee shall be paid, or the method (day, salary or incentive) by which his pay shall be determined. (See footnote.)
>
> * * * * *
>
> Footnote: [Subsection] e . . . above reflect[s] the fact that this National Agreement does not set out specific rates or classifications for jobs, and [is] designed to confirm the intent of Article VI, Section 1 and Article VI, Section 5 (first sentence) that disputes over individual job classifications, rates of pay, incentive standards, etc., are assigned by the parties to local negotiations, and not to arbitration.

Article VI, section 1, referred to in the Footnote, provides:

> 1. Any question which affects hourly rates, piecework rates or salary rates of individuals or groups shall be subject to negotiation between the Local and the local Management.

The Company claims that in deciding whether these rates were changed improperly, an arbitrator will necessarily "consider, rule on or decide the appropriate . . . incentive rate" to be paid for the operations in question. While this argument may be literally correct, we do not think that this is the type of rate dispute which section 7(e) was intended to exclude. The language of the section suggests that its

purpose was to preclude arbitration of the adequacy of pay rates for particular individuals or jobs, or the method of determining them "(day, salary or incentive)," types of assessment ordinarily concluded at the bargaining table. The dispute here, however, is not how much a given job is worth, or whether it should be paid by a day or incentive rate, but whether the Company has complied with contract conditions in changing established rates. Thus, the arbitrator is not called upon to evaluate what an "appropriate" rate should be, but to determine whether the present rate was established by the Company in violation of its agreement.[14] This court made a similar distinction in a prior litigation involving the present parties. In *Carey* v. *General Electric Co.*, 315 F. 2d 499 (2d Cir. 1963), cert. denied, 377 U. S. 908 (1964), the Company contended that a provision in its 1960 Agreement with the Union:

> It is specifically agreed that no arbitrator shall have the authority to establish or modify any wage, salary or piece rate, or job classification or authority to decide the appropriate classification of any employee,

excluded the subject matter of the grievances[15] from arbi-

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14 The very broad scope which the Company claims for section 7(e) is inconsistent with another provision of the arbitration article, section 6(b), which states in part:

> For example, a request which claims incorrect application of the method of computing overtime pay under the provisions of Section 2 of Article V would be arbitrable as a matter of right . . . .

Surely, such a grievance would compel the arbitrator to "consider, rule on or decide" the appropriate pay rate or method of determination as literally as would a claim of an incorrect application of the provisions for changing Standard piece prices.

15 The grievances included the Company's allegedly wrongful reclassification of employees to positions at lower rates of pay, reclassification

tration. In rejecting this argument, we noted, 315 F. 2d at 507:

> The clause was obviously designed to prevent the arbitrator from making the type of decision which is normally reserved for the parties at the bargaining table. Thus, the arbitrator cannot establish wage rates or job classifications where none existed before and cannot modify those rates and classifications which have been hammered out at the bargaining table. . . . Such remedies partake more of "legislation" than adjudication, and our reading of the limiting clause merely gives effect to the parties' apparent intention to restrain the arbitrator from exercising a legislative function. The employer argues that the arbitrator necessarily "establishes or modifies" a wage rate or job classification whenever he declares improper some wage or job decision of the employer; in short, that there is an unauthorized "modification" whenever the arbitrator suggests a change in the status quo. We cannot adopt such a construction of the limiting clause. If a change in the status quo is necessitated by an interpretation of the collective bargaining agreement, then it is not an unauthorized modification.

Similar limiting clauses have consistently been construed not to apply to disputes such as those here in question. See, e.g., *Desert Coco Cola Bottling Co.* v. *General Sales Drivers Local 14*, 335 F. 2d 198 (9th Cir. 1964); *Radio Corporation of America* v. *Association of Professional Engineering Personnel*, 291 F. 2d 105 (3d Cir.), cert. denied, 368 U. S. 898

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on the basis of improper seniority credit, unauthorized conversion of employees from hourly to salary pay, and retroactive deduction of employees' earnings which the Company claimed were paid in excess.

(1961); *IUE* v. *Westinghouse Electric Corp.*, 169 F. Supp. 798 (W. D. Pa. 1958), aff'd, 268 F. 2d 352 (3d Cir. 1959).

The Company contends that it changed the exclusionary clause at issue in *Carey* v. *General Electric* to the broader "consider, rule on or decide" language of the 1963 Agreement precisely to make it clear that grievances of this sort were meant to be arbitrable. While it is true that the 1963 clause is stronger than its predecessor, it fails to meet the high standard of specificity still demanded by the *Steelworkers* trilogy to exclude otherwise arbitrable disputes. Following that principle, this court has insisted that exclusionary clauses be "clear and unambiguous," *Communications Workers* v. *New York Telephone Co.*, 327 F. 2d 94, 96 (2d Cir. 1964), "garbed in unmistakably clear language," *Carey* v. *General Electric*, 315 F. 2d at 507. It is true that the strict requirements of clarity for exclusionary language have been enunciated largely in cases dealing with broad, "standard" arbitration clauses, and there may well be labor contracts in which a very narrowly drawn arbitration clause would suggest a more liberal construction of exclusionary provisions. However, we do not regard this as such a contract, even though, as pointed out above, its arbitration provisions are less expansive than those of its predecessor. Moreover, even if the command of the Agreement not to "proceed under any presumption" of arbitrability could overrule this line of cases,[16] we regard that language as inapplicable where the determination that a dispute is arbitrable has already been made not by use of such a presumption but only on the basis of the limited language of the contract, and the only question left is the effect of specific exclusionary language.

16 See note 11 *supra* and accompanying text.

Although it is not easy to state in the abstract "how specific the provision must be," *Strauss* v. *Silvercup Bakers, Inc.*, 353 F. 2d 555, 557 (2d Cir. 1965), Article XV, section 7(e) is not sufficiently free from ambiguity to exclude all violations of Article VI, section 4. Since the parties agreed to limit the scope of arbitration to violations of specific provisions of the Agreement, it would be reasonable to expect that if they had meant to exclude any such provision from arbitration completely, they would have done so by referring to it individually. In fact, section 7 does expressly set out a number of specific provisions whose violation is excluded from arbitration, see sections 7(d), (h), (k), (l). The parties' failure specifically to designate Article VI, section 4, as one of these excluded provisions lends additional weight to our construction of Article XV, section 7(e), as inapplicable to a dispute whether specified incentive rates were Standard and, if so, were changed without a change in the manufacturing method. Consequently, we hold that the district court was correct in ordering N. D. 9280 and 9349 to arbitration, but we emphasize that the issues to be arbitrated are limited. For example, the arbitrator cannot pass upon the adequacy of the new rate in any way, although if he concludes that the old rate was Standard and that the change in rate was not accompanied by a change in manufacturing method, he can order the old rate reinstated, if he sees fit.

III

We turn now to two grievances brought under Article XV, section 6(a)(i), which requires arbitration as a matter of right of "requests to arbitrate which involve . . . [d]isciplinary action." Despite the care lavished elsewhere in the arbitration provisions, the parties have not defined "discipline" except to provide in broad terms that

> the standard to be applied by an arbitrator to cases involving disciplinary penalties (including discharge) is that such penalties shall be imposed only for just cause.

Article XV, section 1. Moreover, Article XV gives preferred status to arbitrability of claims under section 6 (a)(i) that discipline has been improperly imposed. Thus, sections 3(a) and 4(a) both provide that claims of improperly imposed discipline, if disputed, may proceed to arbitration without the judicial determination of arbitrability which the sections require for all other disputed arbitration requests.[17] Similarly, section 8 even provides for a summary decision without opinion by the arbitrator on the request of either party in some kinds of discipline cases. In addition, section 7(j) excludes from arbitration as a matter of right disciplinary measures imposed upon employees with less than six months of service with the Company. Thus, the arbitration provisions treat requests to arbitrate disciplinary action much differently from requests to arbitrate claimed violations of a specific provision of the Agreement under section 6(a)(ii). As to the former, the arbitration clause is broad and generally unqualified and the parties have emphasized the desire to arbitrate

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17 E.g., section 4(a) provides:

> In the event the receiving party has asserted that the dispute contained in a request for arbitration is not arbitrable, the Association shall have authority to process the request for arbitration and appoint an arbitrator in accordance with the procedure set forth in Section 3 above only after a final judgment of a Court has determined that the grievance upon which arbitration has been requested raises arbitrable issues and has directed arbitration of such issues. *The foregoing part of this Section shall not be applicable if the request for arbitration involves only relief from a disciplinary penalty or discharge alleged to have been imposed without just cause.* [Emphasis added.]

claims that non-probationary employees have been disciplined wrongfully. With this analysis in mind, we consider the particular facts in issue.

N. D. 8759

This grievance involves fifteen of a number of workers engaged in a strike, who refused to return to work and were replaced. The Union contends that they were improperly discharged. The Company's chief argument in opposition to arbitration rests on the refusal of a Regional Director of the National Labor Relations Board to issue a complaint of unfair labor practice regarding the alleged discharge on the grounds that there was insufficient evidence of violation of section 8(a)(1) of the National Labor Relations Act. The Company claims that this refusal constituted a binding determination of the dispute and precludes the Union from seeking relief through arbitration. But apart from the fact that the legal issues before the Regional Director and an arbitrator are different, see *Luckenbach Overseas Corp.* v. *Curran*, 398 F. 2d 403, 405-06 (2d Cir. 1968); *United Steelworkers* v. *American Int'l Aluminum Corp.*, 334 F. 2d 147, 152-53 (5th Cir. 1964) cert. denied, 379 U. S. 991 (1965), the proceeding before the Board was administrative only, neither formally adversarial nor like a trial. As such, it has no collateral estoppel effect. Cf. *IUE* v. *General Electric Co.*, 332 F. 2d 485, 492 (2d Cir.), cert. denied, 379 U. S. 928 (1964); *NLRB* v. *Baltimore Transit Co.*, 140 F. 2d 51, 54-55 (4th Cir.), cert. denied, 321 U. S. 795 (1944); *Glass Bottle Blowers Ass'n* v. *Arkansas Glass Container Corp.*, 183 F. Supp. 829, 831 (E. D. Ark. 1960). The Company also claims that no discharge is involved because the strikers voluntarily chose not to return after the Company lawfully advised them that

they would be replaced. However, whether the Company's action was (1) a "discharge" (2) imposed as discipline (3) without just cause are factual or legal issues, or both, which the parties have agreed to let the arbitrator decide. Consequently, we hold that grievance 8759 was correctly found arbitrable by the court below.

N. D. 8290

As the attached opinion of my colleagues indicates, we differ as to the disposition of this grievance. The following discussion of N. D. 8290, therefore, represents the views of the writer of this opinion.

On November 25, 1963, the Company's Schenectady plant announced that it would give its employees an extra-contractual holiday between the hours of 11:30 A.M. and 2:00 P.M. to permit observance of President John F. Kennedy's funeral. The Company stated that the employees would be paid for these hours, on the condition that they return to work at 2:00 P.M. Employees who did not so return were paid only for the hours actually worked that day. The Union claims that the Company's refusal to pay the non-returning employees was punishment for an infraction of a rule which the Company had unilaterally and improperly imposed. Therefore, the Union contends that this refusal was "disciplinary action" under section 6(a)(i). The Company argues that its nonpayment for hours not worked can in no sense be regarded as "disciplinary" and is not covered by that section. The Company claims that if merely calling company action "disciplinary" is enough to require arbitration, then all of the contractual restrictions on arbitration could be unjustifiably nullified.

The problem is a difficult one, for underlying it is the question of good faith, not confined to insincere use of the

label "discipline." For example, in Part II of this opinion, we considered grievances based on the command of Article VI, section 4(b), that there "be no change in a standard price except where there is a change in manufacturing method." Even if the Union should claim that a changed rate is Standard in the face of very strong evidence to the contrary, under the controlling authorities we may not ordinarily determine that factual issue.[18] On the other hand, if the Union should claim that a change in the number of a room in which a machine is located is "a change in manufacturing method," there is an obvious difference. In the former case, the substantive commitment on which the Union relies is clear in the contract, and the dispute is primarily factual. In the latter, the fact of change of room number is undisputed; the issue is construction of the contract phrase "manufacturing method." I accept the Company's proposition that under this Agreement mere invocation of a contract clause does not preclude judicial examination of the claim of arbitrability; this was the obvious assumption in our holding grievances ND 8427 and ND 8643 non-arbitrable, *supra.* There, we relied on the silence of the contract as to the substantive right claimed combined with the requirements of the arbitration clause that there be an express, not implied, contractual obligation. But where the issue is clearly one of construction of a specific substantive commitment, as in the hypothetical last given, we move on to more treacherous ground. In *American Mfg. Co., supra,* we are told that "questions of contract interpretation" are for the arbitrator and that "[t]he processing of even frivolous claims" is worthwhile. 363 U. S. at 568. But the concurring opinion of Mr. Justice

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18 But see note 12 *supra.*

Brennan in that case, joined in by two other justices,[19] emphasized that the arbitration clause itself must always be construed since "the arbitration promise is itself a contract." 363 U. S. at 570.

The issues before us in this grievance do include construction of the arbitration clause because we must construe the term "disciplinary action" as used in section 6 (a)(i). To some extent the grievance resembles N. D. 8759, just discussed, since the parties again disagree as to whether the Company's action was "disciplinary." However, the issue of arbitrability was simpler in N. D. 8759 since a discharge (if that is what took place, as the Union claims) is frequently a disciplinary action. On the other hand, payment for hours not worked is more often cast in terms of eligibility, as the Company contends; e.g., only those who have worked specified periods are paid vacation pay, holiday pay, etc. Yet, loss of pay may sometimes be regarded as disciplinary.[20] Indeed, the motive and manner of enforcing a "rule" may be significant, and that—on this record—would seem to be in dispute. I do not suggest that the Union could compel arbitration of any conceivable grievance merely by labelling it "disciplinary."[21] The

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19 Mr. Justice Harlan concurred and Mr. Justice Frankfurter stated that he "joins these observations." 363 U. S. at 573.

20 See, e.g., H. Roberts, Roberts' Dictionary of Industrial Relations 79 (1966): "Discipline may take the form of loss of rights under the agreement, being sent home for a period of time, loss of pay, or other penalties set out in the contract or agreed to as a method of avoiding or reducing the incidence of infractions."

It might be noted that quite a considerable volume of grievances arose nationally on various grounds involving holidays granted for observance of the late President Kennedy's funeral. See, e.g., *Neptune World-Wide Moving, Inc.*, 64-2 CCH Lab. Arb. ¶8490; Thomas Wilson Lace Co., *id.* ¶8722; Revlon Corp., *id.* ¶8803.

21 Cf. *Communications Workers* v. *New York Tel. Co.*, 327 F. 2d 94 (2d Cir. 1964).

court must be satisfied that the actions in question could possibly be so construed within a rational application of the phrase.[22] But I do not regard as plainly unreasonable the suggestion that what occurred here was disciplinary even though the Union's case on the merits appears weak and its pressure to arbitrate unwise.[23] Therefore, since the Agreement itself—rather than any externally imposed presumption—indicates a preference for arbitrability of such claims, I would hold with the district court that an arbitrator should decide whether the Company (1) imposed discipline (2) without just cause.

IV

N. D. 7309

This grievance arises under Article VI, section 5(c)(4) of the 1960 Agreement between the Company and the Union:

> The Company will, to the extent practical, give first consideration for job openings and upgrading to present employees when employees with the necessary qualifications are available. In upgrading employees to higher rated jobs, the Company will take into consideration as an important factor, the relative length of continuous service of the employees who it finds are qualified for such upgrading.

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22 See *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, 555 (1964):

> Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts. It is sufficient for present purposes that the demands *are not so plainly unreasonable* that the subject matter of the dispute must be regarded as nonarbitrable because it can be seen in advance that no award to the Union could receive judicial sanction. See *Warrior & Gulf, supra*, at 582-583. [Emphasis added.]

23 The Union's attitude will hardly encourage the Company to grant time off with pay in the future, when it is under no contractual obligation to do so.

A toolmaker employed by the Company applied for one of two open positions as a diemaker, a job at the same rate of pay. The positions were given to employees with less seniority. The Company contends that seniority is relevant only in upgrading and that "upgrading" refers only to jobs at higher rates of pay. The Union responds that a diemaker has certain advantages over a toolmaker, such as displacement rights, and that "upgrading" includes these benefits as well as wage raises. The district court found the Union's argument "a rather weak reed upon which to rely," but held that the claim did involve the "interpretation or application of a provision of this Agreement" under former Article XV, section 1(a). Since, as has been noted above, the 1960 Agreement contains a "standard" type of arbitration clause, the *Steelworkers* presumptions of arbitrability apply in full force.

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. . . .
>
> The courts, therefore, have no business weighing the merits of the grievance . . . or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. . . .

American Mfg. Co., 363 U. S. at 567-68. Cf. *International Longshoremen's Ass'n* v. *New York Shipping Ass'n*, —— F. 2d —— (slip op. 327, 2d Cir. 1968). The claim here,

regardless of its merits, is on its face governed by the language of section 5(c)(4). We affirm the district court's submission of the grievance to arbitration.

To sum up: We affirm the order directing arbitration as to grievances N. D. 9280, N. D. 9349, N. D. 8759 and N. D. 7309, and reverse as to N. D. 8427, N. D. 8643 and N. D. 8290, with the writer of this opinion dissenting as to the last-named grievance.

MOORE and FRIENDLY, *Circuit Judges*:

We follow with admiration our brother FEINBERG's efforts to thread a way through this labyrinthine contract with the single exception of N. D. 8290. There, even granting that words have an accordion-like quality and pushing the accordion to its furthest reach, we are unable to comprehend how a proposal to pay for time not worked can become disciplinary action because it was conditional on prompt return to work. The judgment directing arbitration with respect to N. D. 8290 is therefore reversed.

APPENDIX B

Excerpts of 1963 National Agreement

ARTICLE VI

Wage Rates

1. Any question which affects hourly rates, piecework rates or salary rates of individuals or groups shall be subject to negotiation between the Local and the local Management.

2. The Company shall furnish the respective Locals concerned with information concerning all hourly and salaried job classifications, definitions, rates and progression schedules, including the anticipated earned rate, if any, for piecework jobs, and changes therein, for all jobs included within the bargaining units respectively represented by such Locals. Such Locals will also be informed of those piecework jobs within such bargaining units for which there is no anticipated earned rate. It is understood that the job classifications and definitions referred to above are merely for purposes of identification and general description and do not purport to be all-inclusive or exhaustive of the actual requirements of any job so classified or defined.

3. When an employee is hired or transferred through the Company Personnel Department, he will be given a card showing his job classification, starting rate, rate of progression or progression schedule, if any, job rate and anticipated earned rate and sharing rate, if any, applicable to the job for which he is hired or to which transferred.

4. *Piece Prices—Hourly Rated Piecework Employees*

(a) Piece prices are classified as standard, temporary or special and all piecework vouchers will indicate the classification.

(1) *A Standard Piece Price* is one set where the manufacturing method has become established.

(2) *A Temporary Piece Price* is one set where the manufacturing method is under development or has been changed, or the average pieceworker on the job has not yet attained normal performance.

(3) *A Special Piece Price* is one set on work which usually repeats infrequently or is in small quantities or has some special feature or purpose.

(b) There will be no change in a standard price except where there is a change in manufacturing method.

Where such a change in manufacturing method is made, the price may be adjusted. However, such adjustment shall be limited to those parts of the job affected by the change.

In order that the operator will be able to make the same hourly earnings under a new price where a change in manufacturing method is made which does not reduce the job value on which the original price was computed, the adjusted price will be in direct proportion to the change in allowed time for the part of the job affected by the new method. When a price is reduced on such jobs, the employee and his representative will be given at least one week's notice that the price is to be changed.

(c) Subject to the foregoing, the Company will replace a temporary price with a standard price within six months if reasonably possible under the circumstances.

* * * * *

ARTICLE XV

Arbitration

1. Any grievance which remains unsettled after having been fully processed pursuant to the provisions of Article XIII, and which involves either,

(a) the interpretation or application of a provision of this Agreement, or

(b) a disciplinary penalty (including discharge) imposed on or after the effective date of this Agreement, which is alleged to have been imposed without just cause,

may be submitted to arbitration upon written request of either the Union or the Company, provided such request is made within 60 days after the final decision of the Company has been given to the Union pursuant to Article XIII, Section 2(c). For the purpose of proceedings within the scope of (b) above, the standard to be applied by an arbitrator to cases involving disciplinary penalties (including discharge) is that such penalties shall be imposed only for just cause.

2. (a) A request for arbitration shall state in reasonable detail the nature of the dispute and the remedy requested.

A copy of the request shall be sent to the American Arbitration Association.

(b) Within 30 days after receipt of a request to arbitrate, the receiving party will give its response thereto in writing, with a copy to the Association, stating whether or not it believes the stated dispute to be arbitrable. If the receiving party believes the dispute not to be arbitrable, it will state its reasons in reasonable detail.

(c) If the response agrees to the arbitrability of the dispute, the Association will proceed to process the request in accordance with Section 3.

(d) If a response to a request for arbitration disagrees as to arbitrability of the dispute, either party may request a conference to discuss the arbitrability of the dispute, and to seek to resolve the differences between the parties.

3. (a) When a request for arbitration involves only relief from a disciplinary penalty or discharge alleged to have been imposed without just cause, or involves a dispute which the Company admits to be arbitrable, or when a final court judgment shall have ordered arbitration of a request, the Association shall submit the appropriate matter promptly to one of the Contract Arbitrators listed below for scheduling of a hearing thereon.

The Contract Arbitrators shall serve for the duration of this Agreement. The Asssociation will assign each arbitration case in rotation, in the order of Contract Arbitrators listed below. If a Contract Arbitrator states that he is unable to accept a case, it will be referred to the next Contract Arbitrator in line. In the event one or more of

the Contract Arbitrators shall be unable to continue to serve as such, a replacement or replacements will be named from the list of Alternates set out below, in the order indicated. Any such Alternate who is named as a replacement shall have the duties and powers of the Contract Arbitrator for whom he is the replacement.

Whenever the number of unresolved arbitration requests assigned to a Contract Arbitrator shall exceed three, any additional requests which would otherwise be assigned him in order of rotation shall be referred to the next Contract Arbitrator in line. If at any time, each of the five Contract Arbitrators shall have three unresolved arbitration requests assigned to him, any additional requests will be assigned to the Alternates in rotation, until such time as one or more of the Contract Arbitrators shall have less than three unresolved arbitration requests. The parties may, by mutual agreement, provide that more than three unresolved arbitration requests be assigned to one Contract Arbitrator at one time. In the event that at any time, each of the Contract Arbitrators and each of the Alternates shall have three unresolved arbitration requests assigned, then the number "three" in the first two sentences of this paragraph shall be raised to "four."

Contract Arbitrators	*Alternates*
Leo C. Brown, S.J.	Joseph Brandschain
Sidney Cahn	Charles Gregory
William Gomberg	James Healy
Emanuel Stein	Robert Koretz
Abram Stockman	Louis Yagoda

(b) Only one request shall be scheduled for the same arbitration hearing, except by mutual agreement of the parties.

(c) In the conduct of an arbitration hearing, the applicable provisions of the Voluntary Labor Arbitration Rules of the Association shall control, except that either party may, if it desires, be represented by counsel.

(d) The dispute as stated in the request for arbitration shall constitute the sole and entire subject matter to be heard by the Arbitrator, unless the parties agree to modify the scope of the hearing.

4. (a) In the event the receiving party has asserted that the dispute contained in a request for arbitration is not arbitrable, the Association shall have authority to process the request for arbitration and appoint an arbitrator in accordance with the procedure set forth in Section 3 above only after a final judgment of a Court has determined that the grievance upon which arbitration has been requested raises arbitrable issues and has directed arbitration of such issues. The foregoing part of this Section shall not be applicable if the request for arbitration involves only relief from a disciplinary penalty or discharge alleged to have been imposed without just cause.

(b) In the consideration and decision of any question involving arbitrability (including any application to a court for an order directing arbitration), it is the specific agreement of the parties that:

(i) Some types of grievance disputes which may arise during the term of this Agreement shall be subject to arbitration as a matter of right, enforceable in court, at the demand of either party. (See Section 6 below.)

(ii) Other types of disputes shall be subject only to voluntary arbitration, i.e., can be arbitrated only if both parties agree in writing, in the case of each dispute, to do so. (See Section 7 below.)

(iii) This Agreement sets out expressly all the restrictions and obligations assumed by the respective parties, and no implied restrictions or obligations inhere in this Agreement or were assumed by the parties in entering into this Agreement.

(iv) In the consideration of whether a matter is subject to arbitration as a matter of right, a fundamental principle shall be that the Company retains all its rights to manage the business, including (but not limited to) the right to determine the methods and means by which its operations are to be carried on, to direct the work force and to conduct its operations in a safe and effective manner, subject only to the express limitations set forth in this National Agreement, Local Seniority Supplements executed under the provisions of Article XI thereof, and Local Understandings executed in accordance with Section 3 of Article XXI thereof; and it is understood that the parties have not agreed to arbitrate demands which challenge action taken by the Company in the exercise of any such rights, except where such challenge is based upon a violation of any such express limitations (other than those set out in Section 7 below).

(v) No matter will be considered arbitrable unless it is found that the parties clearly agreed that

the subject involved would be arbitrable in light of the principles of arbitrability set forth in this Article and no court or arbitrator shall or may proceed under any presumption that a request to arbitrate is arbitrable.

(c) If a final judgment of a court has determined that a request raises arbitrable issues, the court's decision shall specify in reasonable detail the issues as to which arbitration is directed. The arbitration shall thereafter proceed only upon the issues specified in such final court judgment and the arbitrator shall have no authority or jurisdiction to consider issues other than those specified.

5. The award of an arbitrator upon any grievance subject to arbitration as herein provided shall be final and binding upon all parties to this Agreement, provided that no arbitrator shall have any authority or jurisdiction to add to, detract from, or in any way alter the provisions of this Agreement.

6. (a) Arbitration as a matter of right includes only requests to arbitrate which involve:

(i) Disciplinary action (including discharge) but with certain exceptions spelled out in this Article;

(ii) The claimed violation of a specific provision or provisions of the National Agreement (with the limitations and exceptions set out in this Article);

(iii) The claimed violation of a provision or provisions of a signed Local Seniority Supplement entered into in accordance with Article XI Sec-

tion 2 of this National Agreement or of a provision or provisions of a Local Understanding entered into in accordance with Article XXI, Section 3 of this National Agreement.

(b) A request for arbitration, in order to be subject to arbitration as a matter of right under the provisions of subsection (a) (ii) and (a) (iii) above, must allege a direct violation of the express purpose of the contractual provision in question, rather than of an indirect or implied purpose. For example, a request which claims incorrect application of the method of computing overtime pay under the provisions of Section 2 of Article V would be arbitrable as a matter of right, whereas a request which questioned the right of the Company to require the performance of reasonable overtime work, on the claimed ground that Article V contains an implied limitation of that right, would be subject only to voluntary arbitration. A request that Article XI and the appropriate Local Seniority Supplement had been violated by the layoff of a senior employee in preference to a junior employee would be arbitrable as a matter of right but a request that subcontracting of work in the plant while bargaining unit employees are on layoff violated a claimed implied limitation of Article XI and the applicable Local Seniority Supplement would be subject only to voluntary arbitration.

7. All requests for arbitration which are not subject to arbitration as a matter of right under the provisions of Section 6 above, are subject only to voluntary arbitration. In particular, it is specifically agreed that arbitration re-

quests shall be subject only to voluntary arbitration, by mutual agreement, if they

(a) Involve the existence or alleged violation of any agreement other than those described in 6(a) above.

(b) Involve issues which were discussed at national level negotiations, but which are not expressly covered in this National Agreement (e.g., subcontracting).

(c) Involve claims that an allegedly implied or assumed obligation of this National Agreement has been violated.

(d) Involve claims that Article I, or Section 3 of Article IV of this National Agreement has been violated.

(e) Would require an arbitrator to consider, rule on or decide the appropriate hourly, salary or incentive rate at which an employee shall be paid, or the method (day, salary or incentive) by which his pay shall be determined. (See footnote)

(f) Would require an arbitrator to consider, rule on or decide any of the following:

(i) The elements of an employee's job assignment;

(ii) The level, title or other designation of an employee's job classification;

(iii) The right of management to assign or reassign work or elements of work. (See footnote)

Footnote: Subsections e, f, and g above reflect the fact that this National Agreement does not set out specific rates or classifica-

(g) Would require an arbitrator to determine the method or data to be used by the Company in setting an incentive price or standard. (See footnote)

(h) Involve claims of violation of Sections 1 and 2 of Article XI, in locations in which a Local Seniority Supplement has not been signed in accordance with Section 2 of Article XI.

(i) Pertain in any way to the establishment, administration, interpretation or application of Insurance, Pension or Savings Plans, or other Benefit plans in which employees covered by this Agreement are eligible to participate;

(j) Involve discipline or discharge imposed on employees having less than six months of service credits with the Company, provided that if by Local Understanding a period of less than six months has been agreed upon as the probationary period for new employees, and such Local Understanding is applicable to the particular employee involved, such agreed upon shorter period of time shall be substituted for "six months" in the foregoing; and provided further that nothing in this subsection shall limit the authority of an arbitrator with respect to disciplinary penalties or discharges imposed in violation of Section 1 of Article IV.

(k) Pertain in any way to Article XXII of this Agreement or its interpretation or application.

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tions for jobs, and are designed to confirm the intent of Article VI, Section 1 and Article VI, Section 5 (first sentence) that disputes over individual job classifications, rates of pay, incentive standards, etc., are assigned by the parties to local negotiations, and not to arbitration.

(l) Pertain in any way to the provisions of any local agreement covering a retraining program under the provisions of Article XXIV hereof, or the interpretation or application thereof.

8. In any case which involves discipline (including discharge) effected on the ground that an employee has refused, orally or otherwise, to perform an assigned task, either party may, at any time before the arbitration hearing is closed, request that the arbitrator decide the matter without an opinion, in which event the arbitrator must simply determine and announce an award without stating any grounds or reasons for his decision. If an award is issued by an arbitrator in any such case, it shall be final and binding on the parties, but, to the extent that the arbitrator's opinion in support of his award interprets or applies any provision of the 1963 GE-IUE National Agreement, such opinion shall not be considered binding upon the parties, and shall not constitute a precedent for the purpose of interpreting or applying that provision of the Agreement in the future.

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APPENDIX

REME COURT. U. S.

1114

FILED
MAR 5 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO,

Respondent.

APPENDIX TO PETITION

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Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of December one thousand nine hundred and sixty-eight.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,

Circuit Judges.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Plaintiff-Appellee,

—v.—

GENERAL ELECTRIC COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in part and reversed in part in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

Opinion of Edward Weinfeld, D.J.

The plaintiff Union moves for summary judgment in this action commenced by it pursuant to section 301 of the Labor-Management Relations Act of 1947[1] to compel, pursuant to the terms of collective bargaining agreements with the defendant, arbitration of eight grievances.[2] The grievances arose at four different plants of the defendant where Locals chartered by the plaintiff represented the employees. The grievances were processed at the Local level under the grievance procedure provided for by the National Collective Bargaining Agreements, but remained unsettled and the defendant refused arbitration. Two of the grievances arose during the existence of the 1960 Agreement, which continued in effect until September 29, 1963; the remaining six arose under the succeeding agreement, referred to as the 1963 Agreement. The plaintiff asserts that each grievance involves the interpretation or application of one or more provisions of those Agreements or a disciplinary penalty imposed by the defendant, and hence is arbitrable under the applicable National Agreement. The defendant resists arbitration upon the ground that each grievance is beyond the reach of the applicable Agreement—that each is specifically and expressly excluded from the arbitral process. As to one item, in addition to non-arbitrability, the defendant contends that the issue involved therein was resolved in its favor by the National Labor Relations Board, and consequently arbitration is foreclosed as a relitigation of an adjudicated issue.

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[1] 61 Stat. 156, 29 U.S.C. § 185.

[2] Originally the complaint alleged 9 unresolved grievances, but subsequent to the commencement of suit one was settled.

The parties are in accord that no issue of fact is raised and that the matters presented are ripe for disposition under the summary judgment rule.

The applicable law is clear and is governed by the trilogy of the Steelworkers' cases decided in 1960.[3] As this court summarized the doctrine of those cases:

> "The underlying rationale of those holdings rests upon the federal policy to promote industrial peace through collective bargaining agreements and the recognition that a major factor in achieving that objective is the grievance machinery established by the parties to resolve disputes as part and parcel of the collective baring process itself. Although viewed in so favorable a climate, the arbitral process for the resolution of grievances is not imposed by law, but must rest upon a consensual basis. Thus the Court's role is limited. It has no concern with the merits of any particular grievance. Its sole inquiry is restricted to whether the parties did agree to arbitrate the grievance. The issue is to be decided within the framework of their collective bargaining agreement. And when the parties have entered into a comprehensive arbitration provision, any challenge that a grievance is not intended to be covered thereunder must find support in unmistakably clear language of exclusion; arbitration of a particular dispute is to be ordered unless it may be said with positive assurance that it is excluded by the contract.

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[3] *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960). See also *Carey* v. *General Elec. Co.*, 315 F.2d 499 (2d Cir. 1963), cert. denied, 377 U.S. 908 (1964); *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 298 F.2d 644 (2d Cir. 1962).

Whatever doubts exist as to whether the grievance is within the ambit of the arbitral process are to be resolved in favor of coverage." [4]

Defendant claims, as we shall see, that, at least as to the grievances asserted under the 1963 Agreement, the force of this doctrine has been attenuated—if not rendered inapplicable—by the express intent of the parties. Thus, we approach each individual contested grievance, mindful of both the duty to recognize the contractual intent of the parties and the duty to effectuate the "preference of national labor policy for arbitration as a substitute for tests of strength between contending forces." [5]

THE 1960 AGREEMENT

The 1960 Agreement, which covers two grievances, provides for arbitration of any grievance that remains unsettled after having been processed through an initial three-step grievance procedure, and involves either:

"(a) the interpretation or application of a provision of this Agreement, or

(b) a disciplinary penalty (including discharge) . . . which is alleged to have been imposed without just cause." (Article XV, section 1)

The Agreement further provides that:

". . . [N]o arbitrator shall have any authority to add to, detract from, or in any way alter the provisions of this Agreement."

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[4] *International Union of Elec. Workers* v. *Westinghouse Elec. Corp.*, 218 F.Supp. 82, 83-84 (S.D.N.Y. 1963), aff'd on opinion below, 326 F.2d 758 (2d Cir. 1964).

[5] *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 549 (1964).

and that

> "... [N]o arbitrator shall have the authority to establish or modify any wage, salary or piece rate, or job classification, or authority to decide the appropriate classification of any employee...." (Article XV, sections 3(a), (b))

NATIONAL DOCKET NO. 7309 [Polizotti—Local 201, Lynn, Mass.]

Polizotti is a toolmaker who applied for one of two open diemakers' positions. The wage rates for the two jobs were the same. The position required diemaking experience. After interviewing Polizotti and other employees, management concluded that while Polizotti had some die repair experience, his diemaking background was virtually nonexistent. Two employees, less senior to Polizotti, but who management decided had more experience, were given the positions. A grievance complaint on Polizotti's behalf was prosecuted without success. The demand for arbitration followed.

Article VI, section 5(c) (4) provides:

> "The company will, to the extent practical, give first consideration for job openings and upgrading to present employees when employees with the necessary qualifications are available. In upgrading employees to higher rated jobs, the Company will take into consideration as an important factor, the relative length of continuous service of the employees who it finds are qualified for such upgrading."

The plaintiff's position is that the available diemaker's position was a "job opening" within the contemplation of the

above provision, and the defendant's refusal to grant it to Polizotti constituted a violation. The defendant urges, to the contrary, that it is inapplicable; that the job involves neither a "job opening" which, in its view, applies only to present employees vis-a-vis new employees, nor an "upgrading," but only a lateral transfer without monetary gain, since the rates were the same; that consequently management's refusal to grant Polizotti's request was not a violation of the Agreement.

The plaintiff, apart from its "job opening" contention, asserts that the diemaker classification was an "upgrading" by reason of advantages which that position offered. In substance it is claimed that Polizotti, had he obtained the diemaker's position, would have been in an advantageous position, since in the event of layoffs due to lack of work, a toolmaker without diemaking experience cannot bump a diemaker. This upgrading contention appears to be a rather weak reed upon which to rely,[6] but whatever its merits or the relative positions of the parties on the issue of "job opening," their very contentions center about the "interpretation or application of a provision of this Agreement"; accordingly, the grievance is subject to arbitration under Article XV, section 1(a).

NATIONAL DOCKET NO. 7788 [Barbara Papagelis—Local 201, Lynn, Mass.]

Preliminarily, an issue is raised as to whether the 1960 or 1963 Agreement applies to this claim. The plaintiff contends

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[6] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568 (1960): "The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." See also *Trailways of New England, Inc.* v. *Amalgamated Ass'n of Street Employees*, 353 F.2d 180 (1st Cir. 1965).

that the grievance arose under and is governed by the 1960 Agreement, which continued in effect until September 29, 1963. The defendant concedes that "initially it arose under the 1960 Agreement," but urges the 1963 Agreement governs because after the grievance procedure failed to resolve the matter, the request for arbitration had been made under the sixty-day provision of the 1963 Agreement[7] rather than under the thirty-day provision of the 1960 Agreement, emphasizing that a sixty-day request under the latter Agreement would have been untimely.

The grievance arose, the operative facts occurred and it was processed during the existence of the 1960 Agreement; accordingly, its provisions are applicable. The fact that the request for arbitration was not submitted within thirty days after the final decision as stipulated under the 1960 Agreement did not bring the 1963 Agreement into play. The defendant's failure to object that the notice was untimely under the 1960 Agreement may have constituted a waiver; in any event, if the grievance is subject to arbitration, the issue of untimeliness is procedural and is for determination by the arbitrator.[8] Accordingly, we turn to the question of the substantive arbitrability of this grievance under the 1960 Agreement.

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[7] Article XV. § 1(a).

[8] *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964). See *Local 1401, Retail Clerks Int'l Ass'n* v. *Woodman's Food Market*, 371 F.2d 199 (7th Cir. 1966); *Local 490, United Rubber Workers* v. *Kirkhill Rubber Co.*, 367 F.2d 956 (9th Cir. 1966); *United Steelworkers* v. *American Int'l Aluminum Corp.*, 334 F.2d 147 (5th Cir. 1964), cert. denied, 379 U.S. 991 (1965); *Carey* v. *General Elec. Co.*, 315 F.2d 499 (2d Cir. 1963), cert. denied, 377 U.S. 908 (1964); *Standard Motor Freight, Inc.* v. *Local 560, Int'l Bhd. of Teamsters*, 49 N.J. 83, 228 A.2d 329 (1967). Cf. *World Brilliance Corp.* v. *Bethlehem Steel Co.*, 342 F.2d 362 (2d Cir. 1965).

Due to lack of work at defendant's Lynn, Massachusetts plant, Barbara Papagelis was laid off on May 16, 1963. She had then worked there over three years. She contended that any one of three other employees should have been laid off first. These employees had not worked at the Lynn plant as long as Miss Papagelis–in fact, they were employed there only about nine weeks. However, respectively, they had twelve (12), thirteen (13) and twenty-seven (27) years service with the defendant, mainly at the East Boston, Massachusetts plant, where the employees had been represented for collective bargaining purpose by a union other than the plaintiff union. The East Boston plant was closed in March 1963; the employees there, including the three in question, were transferred to the Lynn plant; the defendant gave them credit for their years of service at the East Boston plant, which gave them greater seniority than Miss Papagelis.

The Union contended that the laying off of Miss Papagelis on the basis of recognition of the accumulated continuous service of the three employees was in violation of Articles VIII and XI, which govern, respectively, continuity of service and layoffs, and the Preamble to the Agreement. The Preamble includes Local 201 (the Lynn, Massachusetts plant Local) as one of the local unions on whose behalf the plaintiff acted in entering into the National Agreement.

Article XI provides:

"Reduction or Increase in Forces

"1. Whenever there is a reduction in the working force or employees are laid off from their regular jobs, total length of continuous service, applied on a plant,

department, or other basis as negotiated locally, shall be the major factor determining the employees to be laid off or transferred (exclusive of upgrading or transfers to higher rated jobs). However, ability will be given consideration.

"2. Since the number of employees in the individual bargaining units covered under this Agreement varies from less than 50 to more than 10,000, each Local shall negotiate with local Management a written Agreement covering the layoff and rehiring procedure for the employees represented by the Local.

"3. Employees who have been or who may be transferred to jobs outside the bargaining units, may be returned to their former classification in the bargaining unit in accordance with their total length of continuous service."

The defendant, in resisting arbitration, refers to the Agreement antecedent to the 1960 Agreement, which covered the period from 1955 to 1960, wherein Article XI, section 3, contained the same terms quoted above of the 1960 Agreement, except that it included at the end the following sentence:

"Employees in any plant who have been certified in a bargaining unit not covered by this Agreement shall have no rights under this Agreement."

The defendant asserts that this latter provision had been eliminated from Article XI of the 1960 Agreement because of its alleged illegal discrimination in transfers in and out of a bargaining unit on the basis of union or non-union status of the transferees based upon a decision of the National

Labor Relations Board.[9] Whatever the reason for the deletion of the sentence from the 1960 Agreement, the defendant here contends that in consequence of its omission the grievance is not arbitrable inasmuch as it does not involve the "interpretation or application of a provision of this Agreement." The plaintiff, however, does not rely upon the deleted material; it does not rely upon the present Article XI, as well as Article VIII. It contends that thereunder the Local plant seniority favors the grievant and that the accumulated service of defendant's employees not previously employed at the Lynn plant may not be carried over. It argues that Article XI(1), which, with respect to layoffs, provides that "total length of continuous service, applied on a *plant,* department, *or* other basis as negotiated locally, shall be the major factor ...." (emphasis supplied), as well as Article VIII, "Continuity of Service," entitled her to hold her place against the three East Boston plant employees.

The fact, as defendant urges, that in the case of the Lynn plant no Local Seniority Supplement Agreement was entered into does not conclude this issue. That the Local Union failed to agree upon Local layoff procedures did not vitiate the National Agreement on this subject. Thus, even in the absence of a locally negotiated seniority policy, there remains the issue of whether, under the unsupplemented Article XI of the National Agreement, the transferee employees carried their seniority with them. The contentions, whether they have merit or not—a matter which is not for the court—involve the "interpretation or application of a pro-

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[9] *International Ass'n of Machinists (Menasco Mfg. Co.),* 123 N.L.R.B. 627 (1959), modified on other grounds, 279 F.2d 761 (9th Cir.), cert. denied, 364 U.S. 890 (1960).

vision" of the Agreement. The grievance is one that is not foreclosed from arbitration.

The 1963 Agreement

We next consider the remaining six grievances which are governed by the 1963 Agreement. The parties renewed the prior arbitration clause which covered the "interpretation or application of a provision of this Agreement" or "a disciplinary penalty (including discharge)." [10]

However, the parties amplified the arbitration clause. They set forth "principles" which recognized (1) that some types of grievance disputes were arbitrable as a matter of right; (2) that others were subject only to voluntary arbitration; and (3) that the defendant's right to manage and conduct its business was unimpaired, subject only to the terms of the Agreement. In addition, in what the plaintiff concedes was a deliberate purpose to enlarge the exclusionary language of the arbitration provisions, it was provided in Article XV, section 4(b) (v):

> "No matter will be considered arbitrable unless it is found that the parties clearly agreed that the subject involved would be arbitrable in light of the principles of arbitrability set forth in this Article and no court or arbitrator shall or may proceed under any presumption that a request to arbitrate is arbitrable.
>
> * * * * *
>
> "6. (a) Arbitration as a matter of right includes only requests to arbitrate which involve:

[10] Except that time to request arbitration was fixed at 60 instead of 30 days.

(i) Disciplinary action (including discharge) but with certain exceptions spelled out in this Article;

(ii) The claimed violation of a specific provision or provisions of the National Agreement (with the limitations and exceptions set out in this Article);

* * * * *

"6. (b) A request for arbitration in order to be subject to arbitration as a matter of right under the provisions of subsection (a) (ii) . . . must allege a direct violation of the express purpose of the contractual provision in question, rather than of an indirect or implied purpose. . . ."

Upon the basis of the foregoing, the defendant contends that each of the remaining six grievances is completely barred from arbitration. The essential issue before the court is whether these six grievances were excluded from the arbitral procedure by the parties' agreement.

National Docket No. 8290 [Schenectady Plant]

This involves what the Union insists was disciplinary action and which the defendant, with equal vigor, denies. On the morning of November 25, 1963, the day of President Kennedy's funeral, the defendant, in order to permit its observance by employees, announced a cessation of work during the hours of 11:30 a.m. to 2 p.m. with pay, provided the employees returned to work at 2 p.m. Operations were suspended, and those who returned to work received payment for the hours in question. A number of employees, however, failed to return and were not paid for those hours; they were paid only for the actual hours worked on that day.

The Union contends that management's refusal to pay those employees who failed to return to work constituted a disciplinary penalty which, under Article XV 1(b) is arbitrable.

Related thereto is the claim that the suspension of operations by the defendant was unilateral action which changed the hours of work and constituted a violation of Article V 1(a) and (c), which required at least one week's notice.[11]

The company takes issue with the plaintiff's respective contentions. Affirmatively the defendant contends that it put into effect what it describes as "an extra-contractual partial holiday for the period of the funeral"—a "non-recurring furlough."

However one views the merits of the Union's alleged grievance arising out of the company's intended good will gesture, the fact is that the claim of violation of the work-week provision raises an issue, as does the claim that the nonpayment for the hours in question constituted a disciplinary penalty, of interpretation of specific provisions of the Agreement.

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[11] ARTICLE V: "1. (a) *Workweek*

"The regular working week for both salaried and hourly rated employees shall be 40 hours per week, 8 hours per day, 5-day week, from Monday to Friday inclusive. The workweek on multiple shifts may be less than 40 hours.

* * * * *

"(c) When a change is made in the hours of work or working schedules of substantially all employees of a plant or a department thereof, local Management will notify the employees and the Locals respectively affected at least one week in advance of the effective date of such change. When a change is made in the hours of work or working schedules of various individuals or smaller groups of employees, the Foreman will give the affected employees and their Union Steward as much notice as possible. . . ."

Moreover, one aspect of this grievance, the charge that the defendant imposed the suspension of operations unilaterally, presents an issue of fact going directly to the merits of the grievance. The defendant asserts that the suspension of operations had been put into effect only after it had been discussed with Union representatives and that their reaction was favorable. Whether such discussion was had, and, if so, whether the claimed reaction can be construed as consent or waiver of the workweek requirements, and further, whether it was within the authority of those officials is for the determination by the arbitrator—not by the court.

The court holds this grievance is arbitrable.

National Docket Nos. 8427, 8643, 9280 and 9349 [Local 255, Pittsfield, Mass.]

These four grievances present substantially similar issues. They center about Article VI 4 entitled "Piece Prices —Hourly Rated Piecework Employees." Piece prices are classified thereunder as "Standard," "Temporary" and "Special," as follows:

> "4. (a) (1) A Standard Piece Price is one set where the manufacturing method has become established.
>
> "4. (a) (2) A Temporary Piece Price is one set where the manufacturing method is under development or has been changed, or the average pieceworker on the job has not yet attained normal performance.
>
> "4. (a) (3) A Special Piece Price is one set on work which usually repeats infrequently or is in small quantities or has some special feature or purpose."

It is further provided:

> "4. (b) There will be no change in a standard price except where there is a change in manufacturing method. . . .
>
> "4. (c) Subject to the foregoing, the Company will replace a temporary price with a standard price within six months if reasonably possible under the circumstances."

(1) ND 8427

ND 8427 involves a tap selector's job at the Pittsfield plant. The Union contended that although the tap selector's job had been in effect for twenty years, the company had failed to set a Standard Piece Price. It also contended that at one time a Standard Piece Price had been set, but thereafter a methods change was effected and the price was changed; however, when defendant returned to the prior method it failed to reinstate the Standard Piece Price. The plaintiff charged that the defendant's action was a direct violation of Article VI, section 4 (b).

The defendant acknowledges that prior to 1953 the job was classified as Standard Piece Price, but in that year, after Local negotiations with plaintiff, the job was established as a Special Piece Price one, which defendant further asserts was reconfirmed during Local negotiations in 1955, and that ever since the job has remained Special. Consequently it denies any violation.

(2) ND 8643

This grievance involves a new pricing structure for the Pacific Shear in the Power Transformer Tank Unit operation. Since 1950 the operation had been classified, according to the defendant's contention, as a Special Piece Price op-

eration, which had been established on a "flat percentage factor." However, in November 1963, the company substituted a series of predetermined special price time values for the flat percentage factor. The plaintiff contended that the new pricing system, made after thirteen years, was not occasioned by any change in the manufacturing method and so violated Article VI, section 4(b).

The defendant asserts that the foregoing provision is inapplicable, since the original price fixed was not Standard and the plaintiff is seeking a reclassification.

(3) ND 9280 and 9349

These grievances center about a change of prices for Cover & Base Welding Groups of the Power Shear Transformer Tank Unit. ND 9280 involved a change with respect to Power Transformer Cover Welder; ND 9349 involved a change in Layout Tack Weld-Weld Bases.

The Union charges in each instance a change in Standard price without a corresponding change in manufacturing method which allegedly constituted a violation of Article VI, section 4.

The defendant acknowledges these operations in 1954 were established on a Standard price basis, but that as a result of Local negotiations in May 1956 were put on a Temporary and Special price basis. The defendant asserts that the prices on the Cover Welding Group (ND 9280) have remained Temporary since that time; however in November 1964, after the prior introduction of extensive methods and set-up changes, it put into effect a new Temporary pricing system in lieu of the previous Temporary prices.

As to the Base Cover Group (ND 9349), the defendant asserts that this also has been Temporary since 1956—that in 1963 "certain changes in the price system occurred," but

the prices remained Temporary. The plaintiff charges that the pricing structure was not in fact Temporary, but was Standard, and that there were no corresponding methods changes which justified the new pricing system.

In each instance the defendant, in addition to its denial of plaintiff's claim, asserts that the alleged grievance has been expressly placed beyond the reach of arbitration as a matter of right by virtue of Article XV, section 7(e), and related sections, which provide:

> "7. . . . [I]t is specifically agreed that arbitration requests shall be subject only to voluntary arbitration, by mutual agreement, if they . . .
>
> "(e) Would require an arbitrator to consider, rule on or decide the appropriate hourly, salary or incentive rate at which an employee shall be paid, or the method (day, salary or incentive) by which his pay shall be determined. (See footnote)
>
> "Footnote: Subsections e, f, and g above reflect the fact that this National Agreement does not set out specific rates or classifications for jobs, and are designed to confirm the intent of Article VI, Section 1 and Article VI, Section 5 (first sentence) that disputes over individual job classifications, rates of pay, incentive standards, etc., are assigned by the parties to local negotiations, and not to arbitration."

Article VI, section 1—referred to in the above footnote to section 7(e), provides:

> "Any question which affects hourly rates, piecework rates or salary rates of individuals or groups shall be

subject to negotiation between the Local and the local Management."

Accordingly, the defendant argues these limitations upon the arbitrator foreclose consideration of the grievances.

The plaintiff, in reply, contends that the defendant's classifications of the jobs at issue as "Special" or "Temporary" violate the Agreement, and that they should be "Standard," as defined in the Agreement. In sum, they differ as to whether the new pricings violate or conform to the Agreement. The issue involves a specific provision of the Agreement, Article VI, section 4. Despite the defendant's contention, the arbitrator, with respect to the dispute, is not called upon to consider, rule upon or decide an appropriate hourly, salary or incentive rate—these have already been determined by the parties. He is called upon to decide whether the classifications for piece prices, as defined by the parties under Article VI, section 4, have been properly applied by the defendant or, as plaintiff charges, whether the defendant, by an incorrect classification of a rate to a job, violated the terms of Article VI, section 4.[12] The issue to be presented to the arbitrator is whether the piecework rates, as defined by the parties, have been applied by the defendant in accordance with the Agreement. Its determination involves the interpretation or application of Article VI, section 4, and so is subject to arbitration.

National Docket No. 8759 [Trenton, N.J. Plant]

This grievance involved welders employed at the Trenton, New Jersey plant. According to the Union, the men had certain grievances with respect to classification and sought re-

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[12] Cf. *International Union of Elec. Workers* v. *Westinghouse Elec. Corp.*, 268 F.2d 352 (3d Cir. 1959).

classification. The grievances were processed through the three-step grievance procedure, but remained unresolved. Thereupon the men went out on strike. They were out some time and efforts to resolve the dispute failed. Thereafter the defendant, by letter dated April 2, 1964, advised the strikers that if they failed to return to work it would be forced to replace them in order to resume operations. All but fifteen welders returned to their jobs, following which the defendant hired others in their place.

The Union contends that the strike was a protected right under Article XIV, section 1 of the Agreement,[13] and that the discharge of the men constituted a disciplinary penalty without just cause and consequently is arbitrable as a matter of right under Article XV 1(b).

The defendant contends that the strike was an economic strike, that the men were neither discharged nor disciplined, but voluntarily elected not to return to their then vacant positions, whereupon they were permanently replaced.

When others were hired in place of the fifteen, the Local filed unfair labor charges with the National Labor Relations Board, alleging a discriminatory discharge by the defendant of the fifteen employees in violation of section 8(a) of the National Labor Relations Act.[14] Simultaneously, the grievance was processed under the grievance procedure of the Agreement without success, following which the Union's demand for arbitration was refused by the defendant.

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[13] Article XIV, § 1 prohibits strikes or lockouts with respect to any matter subject to the grievance procedure, unless and until the successive steps of the grievance procedure have been complied with or the matter submitted to arbitration.

[14] 29 U.S.C. § 158(a)(1), (3).

The Regional Director, whose decision was sustained by the General Counsel, found that the investigation "failed to reveal sufficient evidence to establish that the Employer threatened those striking welders with discharge rather than with replacement in violation of section 8(a) of the Act because they were engaged in said strike. . . ." and accordingly refused to issue a complaint.

The company contends that the determination by the National Labor Relations Board was final and binding and precludes arbitration of the issue of the cause of discharge of the men and necessarily deprived an arbitrator of jurisdiction to determine the question of whether the discharges were for just cause.

The Union contends that arbitrability of that issue, since it arises under the contract, is not debarred by the Board's determination, which involved an issue under a statutory proceeding. Thus, the question before this court is whether the Board's refusal to issue a complaint charging the defendant with an unfair labor practice by reason of the discharges forecloses an arbitrator from inquiring, under the parties' collective bargaining agreement, whether the discharges were imposed without just cause.

A number of factors require rejection of the plan advanced by the defendant. First, a charge of an unfair labor practice based upon an alleged discriminatory charge in violation of law is not necessarily co-extensive with a charge of an alleged discharge without cause in violation of an agreement.

Second, the doctrine of res judicata or collateral estoppel is inapplicable since the proceeding before the Board was an investigation to determine if a complaint charging the em-

ployer with an unfair labor practice should issue. No hearing was held; the Board's determination that a complaint was not warranted rested upon an administrative inquiry. It was not an adjudicative adversary proceeding.[15] Moreover, the doctrine of preemption does not foreclose this court from ordering arbitration of the grievance even though the subject matter of the grievance is one within the jurisdiction of the Board.[16]

By its refusal to issue a complaint, the Board merely determined the evidence based upon its investigation was insufficient to support a charge of a statutory violation. This ended its inquiry. It did not purport to consider or determine alleged violations of the parties' contract.[17]

Finally, the fifteen strikers, entirely apart from their statutory right not to be discharged for engaging in protected activity, had a contractual right not to be discharged absent "just cause." [18] The contract is very specific on the arbitrability of this issue as a matter of right. It not only provides (Article XV 1(b)) that a disciplinary penalty (in-

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[15] Cf. *International Union of Elec. Workers* v. *General Elec. Co.*, 332 F.2d 485, 492-93 (2d Cir.), cert. denied, 379 U.S. 928 (1964).

[16] See *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962).

[17] Cf. *NLRB* v. *George E. Light Boqt Storage, Inc.*, 373 F.2d 762, 767 (5th Cir. 1967); *United Steelworkers* v. *American Int'l Aluminum Corp.*, 334 F.2d 147 (5th Cir. 1964), cert. denied, 379 U.S. 991 (1965); *International Union of Elec. Workers* v. *General Elec. Co.*, 332 F.2d 485, 492 (2d Cir.), cert. denied, 379 U.S. 928 (1964).

[18] See *Steelworkers* v. *American Int'l Aluminum Corp.*, 334 F.2d 147 (5th Cir. 1964), cert. denied, 379 U.S. 991 (1965); *Lodge 12, Int'l Ass'n of Machinists* v. *Cameron Iron Works*, 257 F.2d 467 (5th Cir.), cert. denied, 358 U.S. 880 (1958); *Package & Utility Drivers, Local 396, Int'l Bhd. of Teamsters* v. *Hearst Publishing Co.*, 206 F. Supp. 594 (S.D. Cal. 1962). See also *Glass Bottle Blowers Ass'n* v. *Arkansas Glass Container Corp.*, 183 F. Supp. 829 (E.D. Ark. 1960).

cluding discharge) alleged to have been imposed without just cause is arbitrable, but also defines the scope of the arbitrator's review with respect to such claims. Thus, Article XV 1 further provides that "... the standard to be applied by an arbitrator to cases involving disciplinary penalties (including discharge) is that such penalties shall be imposed only for just cause."

To deny arbitration of this grievance would have the effect of depriving its employees of access to the contractually agreed upon forum for resolution of issues that have not as yet been passed upon by any other authorized body.

Under the circumstances, this court holds the grievance arbitrable.

Dated: New York, N. Y.
January 26, 1968

United States District Judge